Supreme Court, U.S.
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No. 09-

IN THE

# Supreme Court of the United States

LONG BEACH MORTGAGE COMPANY,

*Petitioner,*

*v.*

ROBB EVANS
AS RECEIVER FOR TLC AMERICA, INC.,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF TEXAS, FIFTH DISTRICT

# PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

The Court is being asked to decide the following issues:

1. Whether the federal receiver, Respondent, was divested of jurisdiction over the Texas property when he failed to timely file his re-appointment papers under 28 U.S.C. § 754.

2. Whether a California federal district court had subject matter jurisdiction to adjudicate a federal receiver's claim to title to property located in Texas.

## PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

Petitioner is Long Beach Mortgage Company, a Delaware mortgage company that merged by operation of law, into Washington Mutual Bank. On September 25, 2008, Washington Mutual Bank was closed by the Office of Thrift Supervision and the Federal Deposit Insurance Corporation (FDIC) was named Receiver. Pursuant to a Purchase and Assumption Agreement between the FDIC as Receiver of Washington Mutual Bank and JP Morgan Chase Bank, National Association dated September 25, 2008, JP Morgan Chase Bank acquired assets of Washington Mutual Bank. Petitioner identifies JP Morgan Chase & Co., a publicly held company, as a parent corporation of JP Morgan Chase Bank, National Association that owns more than 10% of its stock.

Respondent is Robb Evans, a federal receiver appointed by the federal district court in California in the case of *Sec. & Exch. Comm'n v TLC Investments & Trade Co. et al, No. SACV 00-960-DOC, United States District Court, Central District of California.*

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Petitioner Long Beach Mortgage Company, respectfully petitions for a writ of certiorari to reverse the judgment of the Texas Court of Appeals for the Fifth Judicial District and the state district court final judgment in this case.

## OPINIONS BELOW

The opinion of the Texas Court of Appeals for the Fifth Judicial District is reproduced in the Appendix at App. A. The state district final judgment is reproduced in the Appendix at App. B. The order from the Texas Supreme Court that denies the petition for review is reproduced in the Appendix at App. C.

## JURISDICTION

The Texas court of appeals opinion was issued on March 6, 2009. App. A. The Texas Supreme Court entered its order denying petition for review on November 20, 2009. A timely motion for rehearing was denied on January 15, 2010. App. C. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

### U.S. CONST. art. IV, § 1. Full Faith and Credit.

> Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the

Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

28 U.S.C. § 754

**§ 754. Receivers of property in different districts**

A receiver appointed in any civil action or proceeding involving property, real, personal or mixed, situated in different districts shall, upon giving bond as required by the court, be vested with complete jurisdiction and control of all such property with the right to take possession thereof.

He shall have capacity to sue in any district without ancillary appointment, and may be sued with respect thereto as provided in section 959 of this title [28 USCS § 959].

Such receiver shall, within ten days after the entry of his order of appointment, file copies of the complaint and such order of appointment in the district court for each district in which property is located. The failure to file such copies in any district shall divest the receiver of jurisdiction and control over all such property in that district.

28 U.S.C. § 1692

**§ 1692. Process and orders affecting property in different districts**

In proceedings in a district court where a receiver is appointed for property, real, personal, or mixed, situated in different districts, process may issue and be executed in any such district as if the property lay wholly within one district, but orders affecting the property shall be entered of record in each of such districts.

## STATEMENT

The courts below failed to require strict compliance with 28 U.S.C. § 754, a federal statute that creates intra-district *in rem* jurisdiction over property not in the federal district where a receivership proceeding is pending. When a statute creates an exception to the Local Action Doctrine recognized by this Court in *Ellenwood v. Marietta Chair Co.*, 158 U.S. 105, 107 S. Ct. 771, 771, 39 L. Ed. 913 (1895) and creates jurisdiction where none existed under prior statutory or common law, the language creating jurisdiction should be strictly construed and applied because it pertains to the fundamental power courts may exercise over persons or property.

A Federal District Court's power to exercise *in rem* jurisdiction over a piece of property in a different state is authorized in receivership proceedings by two Federal statutes, 28 U.S.C. §§ 1692 and 754. Section 754 is quite

specific about what is required of a receiver appointed by a remote federal district court, and several Federal Circuits have read into the § 754 process an amount of discretion that simply is not included in the text and is not warranted by any policy underlying the statutes; a harm requirement that is not in the text of the statute and should not attach to a fundamental jurisdictional statute.

This case also presents a situation never before directly addressed by any court: does § 754 require a temporary receiver later appointed as a permanent receiver to re-file the copies of the complaint and order of appointment within 10 days of the re-appointment as permanent receiver, in remote districts in which the property subject to litigation in a receivership is located, thus allowing a federal district court to exercise *in rem* jurisdiction over real property which it would otherwise have no power to exercise?

Petitioner seeks review of the ruling of the Texas Court of Appeals for the Fifth Judicial District left undisturbed by the Texas Supreme Court, which affirmed a Texas state district court final judgment that gave Full, Faith and Credit, U.S. CONST. art. IV, § 1, to a federal court judgment litigated in the State of California where Respondent, a federal receiver appointed under 28 U.S.C. § 754, established a constructive trust claim to real property that was located in the State of Texas.

Neither the California federal court nor the Texas Court of Appeals examined whether the "Local Action Doctrine" recognized by this Court in *Ellenwood*, 158 U.S. at 105 applied with regards to federal receivership

causes of action brought under the authority set out in 28 U.S.C. § 754. Whether Congress intended to preempt local actions brought by federal receivers is problematic in that the facial text of 28 U.S.C. § 754 indicates no such intent and *in rem* actions have traditionally been the exclusive subject matter of state courts. Federal receiver's have now obtained new rights unintended by Congress by reason of two Texas state courts not realizing that they have given up State power.

**Background Facts**

On July 24, 2002, Long Beach made a $400,000 Texas home equity loan to Carol and David Price who were the owners of the disputed real property located in Dallas County, Texas. David Price was a principal of TLC Investments and Trade Co., the subject of the SEC enforcement action. On July 23, 2002, Respondent filed a lis pendens in Dallas County, Texas where he referenced that he was seeking to establish an interest in the Texas property in ongoing litigation in California that had been filed in 2001: *Case No. SACV 01-819 DOC, Evans v. Garro, United States District Court, Central District of California, Southern Division at Santa Ana.* The lis pendens was recorded on July 24, 2002, the same day that the loan was funded, and the basis for the claim that was the subject of the lis pendens was the allegation that funds from TLC Investments were improperly used to acquire the Texas property.

In December 2002, the California federal court issued a final judgment that established a "constructive trust" claim to the Texas property in favor of Respondent. In 2003 and 2004 Respondent enforced the

California federal judgment against the Texas property owners David and Carol Price in separate federal court proceedings filed in the United States District Court for the Northern District of Texas. David Price was a party to the California litigation. Carol Price was not.

In 2005, Evans filed suit in Dallas County, Texas against Long Beach to quiet title to the property against Long Beach and to cancel its lien interest in the real property. In 2007, the Dallas state district court gave Full, Faith and Credit to the California federal court judgment and granted a final judgment in favor of Respondent quieting title and canceling Long Beach's lien. App. A.

The Fifth Court of Appeals at Dallas affirmed the trial court and specifically noted that it would not address whether the Local Action Doctrine applied to the California litigation.[1] *Long Beach Mortgage Co. v. Evans*, 2009 Tex. App. LEXIS 1603 (Tex. App. – Dallas, 2009, pet. denied); App. A. The Texas Supreme Court denied the Petition for Review filed by Petitioner. *Long Beach Mortgage Co. v. Evans*, 2010 Tex. LEXIS 67 (Tex. 2010); App. C.

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[1] *See* App A, p. 11 at footnote 5: "... Since we have concluded that the receiver complied with 28 U.S.C. § 754 and that both he and the California federal court had jurisdiction over the Marquette Property, we need not address issues related to the Local Action Doctrine raised by Long Beach." *Long Beach Mortgage Co. v. Evans* 2009 Tex. App. LEXIS at 1603.

## REASONS FOR GRANTING THE PETITION

### I. Texas Appellate Courts and Federal Circuits are in conflict regarding an important jurisdictional requirement Congress created to allow jurisdiction to be exercised by a Receiver or Court in an S.E.C. enforcement action. 28 U.S.C. § 754 sets out specific, mandatory steps to enable a Receiver to extend a Courts jurisdiction to other states and districts in which property may be found. This Court should grant review to establish with certainty the effect on jurisdiction established solely under § 754 of the timely filing of notice of temporary appointment of a Receiver followed by the untimely filing of notice of permanent appointment, a situation that the statutory language does not address.

#### A. 28 U.S.C. § 754 Was Not Complied With And Its Language Requires Strict Compliance

The sole basis of the California District court's (and the Receiver's) jurisdiction over the real property at issue here was the combination of two federal statutes, 28 U.S.C. § 754 and 28 U.S.C. § 1692. The Receiver failed to comply with the clear language of § 754 by not timely filing his permanent appointment in Texas, where the property at issue was located.

Courts construing and applying the § 754 filing requirements have never addressed the situation in which notice of a Receiver of temporary appointment was timely filed, but notice of a subsequent permanent appointment was not. Such a situation is presented here and the statute is unclear about how it should be applied in this situation.

Several Federal Circuits have developed jurisprudence applying 28 U.S.C. § 754 that at least implies, if not requires, that notice of a later, permanent appointment of a Receiver has a separate 10-day filing requirement *and* that jurisdiction established by the timely filing of notice of a temporary appointment lapses if notice of a subsequent permanent appointment is not timely filed. The Texas Courts below disagreed in this case (App. A, B, C) thus establishing a conflict regarding the application of and the procedure under § 754 that this Court should resolve.

On its face, § 754 provides that a receiver upon appointment and giving bond is vested with complete jurisdiction and control and the right to take possession of property in different federal districts and to sue in any federal district. This statute was passed by Congress to cure the early challenges to a federal receiver's control and a federal court's jurisdiction over real property located in states outside the where the federal court adjudicating the claims to the real property was located. *See, e.g., Texas & Pac. Ry. Co. v. Gay*, 86 Tex. 571, 26 S.W. 599 (Tex. 1894), *aff'd*, 167 U.S.745, 42 L. Ed. 1209 (1897) (Louisiana federal court did not have jurisdiction to take possession of property in Texas).

Section 754 requires that a receiver

> ". . . shall within ten days after the entry of his order of appointment, file copies of the complaint and such order of appointment in the district court for each district in which property is located. The failure to file such copies in any district *shall* divest the receiver of jurisdiction and control over all such property in that district."

28 U.S.C. § 754. Then, under 28 U.S.C. § 1692 in a district court where a receiver is appointed involving property in different districts, process may issue and be executed in any such district as if the property is within one district. Only if the requirements of Section 754 are met is the court of appointment's territorial jurisdiction extended under section 1692. *Sec. & Exch. Comm'n v. Ross*, 504 F.3d 1130, 1146 (9th Cir. 2007).

### B. The Courts Below Improperly Recognized *In Rem* Jurisdiction Despite A Failure To Comply With The Enabling Statute.

The United States District Court for the Central District of California, Southern Division at Santa Ana Division in which the receivership proceeding was pending appointed a receiver on a temporary basis and later on a permanent basis. The Section 754 filing of the notice of temporary appointment was timely. The notice of permanent appointment was not, however, filed within the 10-day period required by the statute.

The precise issue presented here has not been directly addressed by any Federal Circuit Court of Appeals. Specifically, the question is whether the filing of a notice of permanent appointment of a receiver as required by 28 U.S.C. § 754 must be within the 10-day period the statute requires when a timely filed notice of temporary appointment exists. The reasoning that has been applied by the 9th and D.C. Circuits to issues arising from the untimely filing of the notice and pleadings is consistent with premise that the appointment of a permanent receiver immediately supersedes the temporary appointment and must be filed within the 10-day period § 754 requires.

First, the language of the statute does not mention or implicitly contemplate that a timely filed temporary appointment effectively permits the "hold over" exercise of *in rem* jurisdiction after a permanent appointment is made but before it is filed.

In *Sec. Exch. Comm'n v. American Capital Investments, Inc.*, 98 F.3d 1133 (9th Cir. 1996), the Court specifically held that appointment of a permanent receiver required the timely filing of a notice pursuant to § 754. In that case, the receiver was temporarily appointed on September 2, 1993, and the order of temporary appointment was signed on September 10. The order of permanent appointment was entered on September 23 and the receiver made the § 754 filings on September 27. *Id.* at 1143. The Appellants argued that the 10-day period ran from the temporary appointment date and that the receiver lost jurisdiction over the property by not filing the required notices within that period. The Receiver contended that the 10-day period ran from the date of *permanent* appointment. *Id.*

The Court did not reach the question of whether the filing period ran from the temporary or permanent appointment. It held, instead that permanent appointment started a new 10-day period, *Id.*, relying on *Sec. Exch. Comm'n. v. Vision Communications Inc.*, 74 F.3d 287, 291 (D.C. Cir. 1996). That new 10-day period ran from the entry of the order of permanent appointment.[2] The Court's

[2] The *American Capital* court also noted that there had been no attempt to show prejudice from the late filing of the temporary appointment, dicta that demonstrates the improper engrafting of a harm analysis on what is clearly mandatory statutory language. *See, e.g., Sec. Exch. Comm'n v. Equity Service Co.*, 632 F.2d 1092, 1095 (3rd Cir. 1980) (receiver allowed to reassume jurisdiction after a late § 754 filing when no prejudice to other claimants); *United States v. Arizona Fuels Corp.*, 739 F.2d 455, 460 (9th Cir. 1984).

position in *American Capital, supra*, is correct. In *Vision Communications*, 74 F.3d at 287, the receiver filed his § 754 documents two months after his appointment. *Id.* at 290. Rejecting the contention that the receiver's late filing could establish jurisdiction retroactively, the D.C. Circuit held that jurisdiction had been divested 10 days after the order of appointment was signed. *Id.* at 291. The Court went on the note that a re-appointment of the receiver was necessary to start the 10-day filing period over again, thus supporting the view, and Long Beach's position, that the permanent appointment of the receiver in this case required a second filing that happened almost two months too late, thus divesting the receiver of jurisdiction over the real estate in question, and requiring, as in *Vision Communications*, a re-appointment.

The decision of the Court of Appeals in Dallas, Texas, directly conflicts with these Federal Courts of Appeal. The Court failed to acknowledge that the permanent appointment required a new filing of the permanent receivership order and it, in essence, acknowledged a retroactive creation of jurisdiction over the residence in question in direct conflict with the D.C. Circuit's holding in *Vision Communications*.

In short, the Texas Courts have interpreted a federal statute in direct conflict with two Federal Circuits. Because the conflict involves jurisdictional questions, this Court should settle the question. Because a court's jurisdiction is the very basis of a court's power to act, statutes conferring or modifying courts' jurisdiction, particularly involving fundamental principles of *in rem* jurisdiction should be strictly construed. Where statutory language is ambiguous or subject to differing interpretations or applications, any such conflict should be clarified and harmonized to provide a degree of certainty upon which actions can be based.

## II. The Courts Below Should Have Determined Whether Respondent's Action Tried in California Was Local or Transitory. If the Action Was Local Then the Courts Should Have Determined Whether the Local Action Doctrine Applied.

This Court has recognized that states where real property is located have exclusive jurisdiction where title to real property is at issue. *Durfee v. Duke*, 375 U.S. 106, 115, 84 S. Ct. 242, 11 L. Ed. 2d 186 (1963) (courts of one State are completely without jurisdiction directly to affect title to land in other States); *Underwriters Nat. Assur. Co. v. North Carolina Life and Acc. and Health Ins. Guaranty Ass'n*, 455 U.S. 691, 706 n.11, 102 S. Ct. 1357, 71 L. Ed. 2d 558 (1982) (exclusive jurisdiction each State has to control the administration of real property within its borders).

The Local Action Doctrine holds that an action to recover title or the possession of land is a "local action" that can only be brought in the state where the property lies. *Ellenwood*, 158 U.S, at 105; *Morris v. Missouri R*, Co., 78 Tex. 17, 14 S.W. 228 (Tex. 1890). The doctrine is a matter of subject matter jurisdiction. *Hayes v. Gulf Oil Corporation*, 821 F.2d 285, 291 (5th Cir. 1987); *Livingston v. Jefferson*, 15 F. Cas. 660, F. Cas. No. 8411 (C.C. D. Va. 1811).

The *Long Beach* opinion is serious and pervasive because the title claim asserted by Respondent in the California litigation would have otherwise been governed by the Local Action Doctrine and was not permissible under Texas law.

First, in Texas, a constructive trust suit that seeks equitable title to real property can only be brought in the county where the property is located. *MacDonald v. Follett*, 142 Tex. 616, 180 S.W.2d 334 (Tex. 1944); *In re Wells Fargo Home Mortg.*, 2009 Tex. App. LEXIS 69 (Tex. App. - Corpus Christi 2009, no pet.); TEX. CIV. PRAC. & REM. CODE § 15.011 (Vernon 2002).

Second, the Texas lis pendens statute that allows for notice of litigation to be filed in the county where the real property is located applies only to *direct* interests being asserted in real property, not to *collateral* interests. *Flores v. Haberman*, 915 S.W. 2d 477 (Tex. 1995); TEX. PROP. CODE § 12.007(a) (Vernon Supp. 2009). In *Flores*, the Texas Supreme Court held that the lis pendens filed in a constructive trust suit to trace converted funds used to purchase real property was an action *collateral* to the property because the claim was being used to trap the real estate during the litigation in order to satisfy a judgment. See also, Roberts, *The Propriety of a Lis Pendens in Constructive Trust Cases*, 38 Seton Hall L. Rev. 213, 242 (2008)(Texas law does not allow a lis pendens to be used in a constructive trust claim that involves the tracing of funds.)

Respondent argued that his lis pendens was valid within the meaning of *Flores* because he sought to acquire title to the Texas property so that he could transfer it and that that the Local Action Doctrine no longer applied in light of 28 U.S.C. § 754.

But by admitting that he sought title to the property, Respondent validated that he sought a *direct* interest in the property and the proper use of the lis pendens statute. In doing so, he also necessarily admitted that the action was local in nature.

Respondent's constructive trust suit in California was permissible only if it was a transitory cause of action. *Keller v. Millice*, 838 F. Supp. 1163 (S.D. Tex. 1993). A transitory cause of action, where one seeks to establish an interest in real property, is not a title dispute and is permitted to be adjudicated in courts outside the State where the real property is located because the court has a basis for in personum jurisdiction over the defendant. *Massie v.* Watts, 10 U.S. 148, 159, 6 Cranch 148, 3 L. Ed 181 (1810) For example, in *FTC v. Neiswonger*, 2009 U.S. Dist. LEXIS 83937 (E.D. Mo. 2009) a federal court in Missouri ordered the non-party spouse, under the possibility of contempt, to transfer marketable title to real property located in Nevada. Title to the property was not at issue in that case. But note that in *Sleeping Child LLC v. Lewis and Clark Capital LLC*, 2008 Mont. Dist. LEXIS 492 (2009) a state district judge issued an opinion that original jurisdiction over an action to quiet title was in the Montana state courts where the property was located and not in the California federal receivership. The court noted that the federal receiver submitted to jurisdiction in Montana by filing an interest of record against the real property at issue.

Based on the foregoing arguments it was error to give Full, Faith and Credit to the California federal court judgment. U.S. CONT. art. IV §1. As noted in a recent law review article, *in rem* judgments are *not* necessarily entitled to Full Faith and Credit:

> Full faith and credit applies to valid and final in personain judgments rendered in American courts. It applies to both legal and equitable decisions but generally does not apply to in rem

> judgments for real property . . . courts generally lack jurisdiction to adjudicate claims to real property outside the forum. Thus, any real property judgment needing extraterritorial enforcement will be invalid for lack of jurisdiction. Judgments regarding title to real property have no interstate effect, for two reasons — if the land is located in F-1, there will be no need to enforce it elsewhere, and F-1 lacks jurisdiction to adjudicate claims to land elsewhere. See, e.g,, *Fall v. Eastin*, 215 U.S. 1 (1909) (holding that Nebraska is not required to recognize Washington state divorce court's determination of land title in Nebraska); *McElreath* v. *McElreath*, 345 S.W2d 722 (Tex. 1961); cf. *Durfee* v. *Duke*, 375 U.S. 106 (1963). This is further explained by the exception to full faith and credit, which does not require recognition of an F-1 judgment adjudicating something over which F-2 had exclusive control.

George, *Enforcing Judgments Across State and National Boundaries: Inbound Foreign Judgments and Outbound Texas Judgments*, 50 S. Tex. L. Rev. 399 (2009).

## III. By Refusing to Examine Whether the Local Action Doctrine Applies to Actions Brought by Federal Receivers under 28 U.S.C. § 754, the Texas and Federal Courts Have Engaged in Implied Preemption of the Local Action Doctrine.

Implied preemption only occurs when Congress sufficiently evidences its intent to exclusively occupy the field and when the state law conflicts with the federal law by making simultaneous compliance impossible or by creating an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *Crosby v. Nat'l Foreign Trade Council*, 580 U.S. 363, 872, 120 S. Ct. 2288, 147 L. Ed. 2d 352 (2000).

Long Beach has not found any case law or specific congressional intent to preempt the Local Action Doctrine by reason of 28 U.S.C. § 754 and 1692. As Section 754 requires that he file his appointment papers in the federal district where the property is located, this requirement itself suggests that in certain cases suit should be filed where the property is located. The receiver's window to file his appointment papers — only ten days is narrow. This indicates that Congress did not intend to allow properties to be tied up indefinitely in federal receivership proceedings who fail to assert jurisdiction over receivership property. Section 754 provides that a receiver "shall have capacity to sue in any district without ancillary appointment, and may be sued with respect thereto as provided in section 959 of this title [28 USCS § 959]." This suggests that Congress intended for the receiver to litigate in forums outside where he was located. Congress has also been sensitive

to title disputes in other contexts. In eminent domain actions Congress provided that such proceedings be brought in the district where the district where the property is located. 28 U.S.C. § 1403.

If the Respondent had followed Texas law and the Local Action Doctrine, he would have adjudicated this suit in one proceeding in Texas. Instead, he filed four successive lawsuits to adjudicate his title claim. The first suit was in California: *Case No. SACV 01-819, Evans v. Garro, United States District Court, Central District of California, Southern Division at Santa Ana.* The next two were separate suits against the property owners in the Northern District of Texas: *Case No. 3:03-MC-00022-M, Evans v. Garro, United States District Court, Northern District of Texas, Dallas Division; Case No. 3-03MCO22-M, Evans v. Garro, United States District Court, Northern District of Texas, Dallas Division.* The fourth suit was the action to quiet title proceeding below filed against Petitioner. (App. B). Congress could not have intended such an inefficiency.

Texas law, the Local Action Doctrine and the federal receiver statutes under Sections 754 and 1692 do not conflict, but work in harmony with each other. There certainly is no clear statutory intent to always give a federal receiver a home court advantage to litigate nor was there intent to override over 100 years of land title litigation involving the Local Action Doctrine simply because a federal receiver has been appointed.

## CONCLUSION

For the foregoing reasons, a petition for a writ of certiorari should be granted.

Respectfully submitted,

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# APPENDIX

## APPENDIX A — OPINION OF THE COURT OF APPEALS OF TEXAS, FIFTH DISTRICT, DALLAS DATED MARCH 6, 2009

### COURT OF APPEALS OF TEXAS, FIFTH DISTRICT, DALLAS

No. 05-07-00435-CV

LONG BEACH MORTGAGE COMPANY,

Appellant

v.

ROBB EVANS, AS RECEIVER FOR TLC AMERICA, INC.,

Appellee

March 6, 2009, Opinion Issued

**JUDGES:** Before Justices Bridges, Francis, and Whittington.[1] Opinion By Justice Bridges.

**OPINION BY:** DAVID L. BRIDGES

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1. The Honorable Mark Whittington, Justice, Court of Appeals, Fifth District of Texas at Dallas, retired, sitting by assignment. This appeal was submitted to the panel before Justice Whittington retired on December 31, 2008.

*Appendix A*

## OPINION

Opinion By Justice Bridges

This case involves competing interests in residential property located in Texas. Long Beach Mortgage Company appeals from a summary judgment. In three issues, Long Beach challenges the trial court's grant of Robb Evans's motion for summary judgment, the denial of Long Beach's motion for summary judgment, and the award of attorneys' fees to Evans. We affirm the judgment of the trial court.

### Background

In 2000, the Securities and Exchange Commission brought suit in California against TLC America, Inc. and related business entities and individuals for federal securities laws violations with regard to the misuse and diversion of over $ 28 million in investor funds ("SEC Litigation"). In the SEC Litigation, the California federal court appointed Robb Evans as temporary receiver, giving Evans the "full powers of an equity receiver, including, but not limited to, full power over all funds, assets, collateral, premises . . . of TLC." The order also authorized Evans "to hav access to and to collect and to take custody . . . of all assets . . . of TLC" and "to take such action as is necessary and appropriate to preserve . . . any assets of TLC." Evans then filed his initial order of appointment and the complaint from the SEC Litigation in the United States District Court for the Northern District of Texas. The court in the SEC

Litigation later entered an order appointing Evans as the permanent receiver of TLC America.

After his appointment, Evans brought suit in the United States District Court for the Central District of California against multiple defendants, including Durham Capital Group, Inc. and David Price, the president of Durham, to recover TLC America's property (the "Garro Litigation").[2] Evans asserted claims of fraud, conversion, negligence and breach of fiduciary duty in the Garro Litigation. Evans also sought the imposition of a constructive trust on property purchased with funds stolen from TLC America.

In the Garro Litigation, Evans alleged that over $2.5 million of TLC America's funds had been wired into a Durham Capital Group, Inc. bank account controlled by David Price and his former wife, Carol Miller Price. During the course of the Garro Litigation, Evans discovered that over $ 1 million of the funds transferred into the Durham account were diverted into an account separately maintained by Carol Miller Price. Carol Miller Price then used this money to purchase a personal residence in Texas, the Marquette Property, in October 1999. Upon discovering that TLC America's funds had been used to purchase the Marquette Property, Evans filed a notice of lis pendens on July 23,

2. The Garro Litigation is styled and numbered *Robb Evans, as Receiver for TLC America, Inc. v. James F. Garro, et al.*, Case No. 01-6466, in the United States District Court for the Central District of California.

2002. The notice was recorded in Dallas County, Texas on July 24, 2002.

Also on July 24, 2002, David Price and Carol Miller Price borrowed $ 400,000 from Long Beach through a home equity loan. A deed of trust on the Marquette Property secured this loan. On August 2, 2002, Long Beach filed its deed of trust in Dallas County, Texas, creating a lien on the Marquette Property. The Prices ultimately defaulted on their loan with Long Beach.

In December 2002, the California federal court in the Garro Litigation found David Price and Durham Capital jointly and severally liable to Evans, as receiver for TLC America, in the amount of $3,505,001.59. The federal court also imposed a constructive trust over the Marquette Property.

After the constructive trust was imposed in the Garro Litigation, Evans petitioned the court in the SEC Litigation for permission to sell the Marquette Property. The court in the SEC Litigation granted Evans permission to sell the Marquette Property "free and clear of all liens and interests therein, with such liens and interests to attach to the net proceeds of sale." The court further ordered that "the sale proceeds shall be held in trust by [Evans] pending resolution of all disputes concerning distribution of the sale proceeds and any claimed interests in the [Marquette Property.]" The court further ordered David Price, Carol Miller Price, Long Beach, and any other third-party claimant to file a claim with the court within sixty days if they

intended to assert an interest in the sale proceeds. The court authorized Evans to "perform any and all other acts necessary to effectuate the orderly sale of the [Marquette Property.]"

Long Beach did not file a claim in the SEC Litigation pursuant to the court's order. Long Beach contends that it did not file a claim because it was not served with the order providing the sixty-day deadline to assert a claim to the sale proceeds. Consequently, the California federal court did not resolve Long Beach's lien claim, thereby clouding title to the Marquette Property.

Evans registered the judgment imposing the constructive trust for enforcement in the United States District Court for the Northern District of Texas. In 2004, the federal court for the Northern District of Texas divested the Prices of all title and interest to the Marquette Property and vested full fee simple title to the Marquette Property in Evans.

Evans has filed this lawsuit against Long Beach in state district court to resolve Long Beach and Evans's competing claims (i.e. Evans's lis pendens and Long Beach's deed of trust) to the Marquette Property. The parties filed traditional cross-motions for summary judgment. The trial court granted summary judgment in favor of Evans and denied Long Beach's motion. The court entered a final judgment in favor of Evans, which declares his lis pendens valid and effective with respect to the Marquette Property and superior to Long Beach's deed of trust lien claim. The judgment further

declares Long Beach's deed of trust claim invalid and of no force and effect with respect to the Marquette Property and quiets title to the Marquette Property in Evans. The final judgment also authorizes Evans to sell the Marquette Property and awards Evans his attorneys' fees.

The trial court denied Long Beach's motion for new trial and this appeal ensued.

**Discussion**

***Standard of Review***

The standards for reviewing a summary judgment are well established. The party moving for summary judgment has the burden of showing no genuine issue of material fact exists and that it is entitled to judgment as a matter of law. *See* Tex. R. Civ. P. 166a(c); *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548 (Tex. 1985). In deciding whether a disputed material fact issue exists, precluding summary judgment, evidence favorable to the non-movant will be taken as true. *Nixon*, 690 S.W.2d at 548-49. Further, every reasonable inference must be indulged in favor of the non-movant and any doubts resolved in its favor. *Id.* When both parties move for summary judgment, each party bears the burden of establishing that it is entitled to judgment as a matter of law. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 356 (Tex. 2000). We review the summary judgment evidence presented by both parties and determine all questions presented. *Id.* The reviewing

court should render the judgment that the trial court should have rendered, or remand if neither party has met its summary judgment burden. *Id.*

***Issues One And Two***

In its first and second issues, Long Beach contends the trial court improperly granted Evans's motion for summary judgment and denied its motion. Within these issues, Long Beach contends: (1) the California federal court and Evans lacked *in rem* jurisdiction over the Marquette Property; (2) the lis pendens was ineffective because it evidences collateral issues; (3) "the interplay between the local action doctrine and collateral issues" are problematic; (4) the pleadings in the Garro Litigation do not support lis pendens in Texas; and (5) the lis pendens did not provide it with constructive notice.

1. Long Beach's First and Third Arguments-Whether Evans And The California Federal Court Had Jurisdiction

With regard to its first and third arguments, Long Beach contends that the California federal court and Evans lacked *in rem* jurisdiction over the Marquette Property because Evans failed to file the complaint and order of appointment within ten days as required by 28 U.S.C. § 754. A receiver achieves jurisdiction and control of property in districts other than that of appointment by following the requirements of 28 U.S.C.

§ 754. *See U.S. v. Arizona Fuels Corp.*, 739 F.2d 455, 460 (9th Cir. 1984). Section 754 provides, in pertinent part, as follows:

> A receiver, appointed in any civil action or proceeding involving property, real, personal or mixed, situated in different districts shall, upon giving bond as required by the court, be vested with complete jurisdiction and control of all such property with the right to take possession thereof.
>
> . . .
>
> Such receiver shall, within ten days after the entry of his order of appointment, file copies of the complaint and such order of appointment in the district court for each district in which the property is located. The failure to file such copies in any district shall divest the receiver of jurisdiction and control over all such property in that district.

28 U.S.C. § 754.

The record before us reflects Evans was appointed temporary receiver in the SEC Litigation by order dated October 4, 2000. This order and the accompanying complaint were filed in the United States District Court for the Northern District of Texas nine days later, on October 13, 2000. The California federal court then appointed Evans as permanent receiver on November

1, 2000, but the order was not forwarded to the Northern District of Texas until December 20, 2000 and was not stamped "received" by the clerk of the Northern District of Texas until January 2, 2001.

Relying on the Local Rules for the Central District of California, Long Beach contends that because Evans's temporary receivership expired before he was permanently appointed and because he failed to file his order of permanent appointment within ten days of the order, both he and the federal court lacked jurisdiction over the property.[3] Other than bare citations to the local rules, Long Beach offers no argument, supported by authority, for this proposition. Moreover, the California federal court continued its jurisdiction over the case to resolution. In the absence of authority which mandates the receiver is divested of jurisdiction for his purported failure to comply with the local rules, we will not conclude that the local rules divested Evans and by

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3. These rules provide, in pertinent part, as follows:

> 25.2 **Temporary Receiver-Term of Appointment.** A temporary receiver shall not be appointed for a period longer than the next Motion Day following the expiration of twenty (20) days after the date of appointment.
>
> 7.2 **Motion Days.** Each Monday, commencing at 10:00 a.m., shall be "Motion Day" on which motions will be heard . . . .

extension, the California federal court, of jurisdiction over the Marquette Property.[4]

Further, section 754 does not specify or require that both the temporary and permanent appointment orders be filed within ten days for the receiver to maintain jurisdiction. Instead, section 754 only states "within ten days after the entry of his order of appointment," the order should be filed in the district court for each district in which the property is located. *See* 28 U.S.C. § 754. Long Beach has not cited us to any authority, and we have found none, which mandates that the ten-day requirement be fulfilled after both the temporary and permanent appointments of receivership for Evans to maintain jurisdiction over the property at issue. *See S.E.C. v. Am. Capital Investments, Inc.*, 98 F.3d 1133, 1142-43 (9th Cir. 1996) (stating no case addresses whether the 10-day period of § 754 commences after a temporary appointment or only upon a permanent appointment), *abrogated on other grounds by Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998). We conclude Evans's filing of the order of appointment as temporary receiver and complaint within the ten-day period

4. Long Beach also argues that the order appointing Evans as temporary receiver expired by its own terms on October 16, 2000 and divested Evans of jurisdiction. However, the October 4 order which appointed Evans temporary receiver also contained, among other orders, a temporary restraining order. The October 4 order only reflects expiration of the TRO on October 16, 2000, not the expiration of Evans's receivership status.

established Evans's jurisdiction over the Marquette Property. *See* 28 U.S.C. § 754. Furthermore, Evans was not required to file his appointment of permanent receivership within the ten-day period in order to maintain the jurisdiction already established by his timely filing of the order of appointment as temporary receiver and accompanying pleading. *See id.* We conclude Evans complied with section 754 and both he and the California federal court had jurisdiction over the Marquette Property.[5]

2. Long Beach's Fourth Argument-Whether The Pleadings Support The Lis Pendens

In its fourth argument, Long Beach asserts the lis pendens was ineffective because the pleadings in the Garro Litigation do not support the lis pendens. Long Beach also contends the lis pendens is ineffective because the Marquette Property is not specifically identified on the face of the Garro Litigation pleading. Section 12.007 *of the property code* provides a lis pendens must state: (1) the style and number, if any, of the proceeding; (2) the court in which the proceeding is

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5. Long Beach also argues the Local Action Doctrine applies to this case. The Local Action Doctrine provides that a local action must be brought in the state where the property is located. *See Hayes v. Gulf Oil Corp.*, 821 F.2d 285, 287 (5th Cir. 1987) (tracing history of local action doctrine). Since we have concluded the receiver complied with 28 U.S.C. § 754 and that both he and the California federal court had jurisdiction over the Marquette Property, we need not address issues related to the Local Action Doctrine raised by Long Beach.

pending; (3) the names of the parties; (4) the kind of proceeding; and (5) a description of the property affected. The lis pendens before us provides the statutory requirements.[6] TEX. PROP. CODE ANN. § 12.007 (Vernon 2004). The lis pendens notice in this case provides:

> **NOTICE IS HEREBY GIVEN** that Case No., 01-6466, styled ROBB EVANS, as Receiver for TLC America, Inc., Plaintiff v. James F. Garro, an individual; David Price, an individual; . . . Durham Capital Group, Inc., a Nevada corporation; . . . Defendants; was commenced in the United States District Court for the Central District of California on July 27, 2001 and is now pending in such court.

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6. Long Beach also contends the pleading in the Garro Litigation was not sufficient to support Evans's lis pendens notice because the cause number listed on the lis pendens did not match the cause number on the first amended petition filed in the Garro Litigation. The record reflects the cause number in the Garro Litigation changed when the case was transferred to another division of the California federal courts. Long Beach contends Evans did not file a lis pendens referencing the suit brought in the new cause number and, therefore, the lis pendens did not provide proper notice. However, Long Beach raises this argument for the first time on appeal. The argument is, therefore, waived and we need not address it. *State Bd. of Ins. v. Westland Film Indus.*, 705 S.W.2d 695, 696 (Tex. 1986); *Collins v. City of Corpus Christi*, 188 S.W.3d 415, 423 (Tex. App.—Corpus Christi 2006, no pet.).

*Appendix A*

> The action seeks to establish an interest or a right in real property situated in Dallas County, Texas, and described as follows:
>
> **7843 Marquette Street, Dallas, Texas 75225-4400**
>
> **Caruth Village Phase 2**
>
> **Blk R/54 50 LT 10**
>
> **VOL 9920 9/62 10 DD 102399 CO-DALLAS**
>
> The action is fraud and deceit; aiding and abetting; conversion; money had and received; negligence; breach of fiduciary duty; and constructive fraud . . . .

(emphasis in original).

We agree that Evans does not specifically reference the Marquette Property in the first amended complaint of the Garro Litigation even though he does specifically refer to other properties. In the first amended complaint, Evans uses a "catch-all" phrase to request the court to (1) declare "any other purchases or investments made with TLC's funds [be held] in a constructive trust for the benefit of TLC," (2) declare "TLC the owner . . . of any other purchases or investments made with TLC's funds" and (3) order a conveyance to TLC of "any other purchases or

investments made with TLC's funds." Evans argues this catch-all phrase encompasses the Marquette Property. Long Beach has not cited us to any case authority requiring the pleading to specifically identify the property listed in the lis pendens and, after an extensive search, we too have found no case which mandates the specific identification of the property in a pleading to support the lis pendens. Without such authority, we decline to overturn the judgment on that basis.[7]

3. Long Beach's Second Argument-Whether The Lis Pendens Evidences Collateral Issues

Long Beach also argues the relief sought in the Garro Litigation only collaterally involved the Marquette Property so it cannot support the lis pendens. In support of this proposition, Long Beach directs us to section 12.007 of the Texas Property Code.

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7. Long Beach also contends that lis pendens was not proper because Carol Miller Price was not a party to the Garro Litigation, and "nothing in the summary judgment record supports the relief sought by Evans with respect to the property interest vested in Carol Price . . . ." However, Carol Miller Price never had a valid claim to the Marquette Property since the California federal court found money diverted from TLC was used to purchase the Marquette Property. *See Teve Holdings Ltd. v. Jackson*, 763 S.W.2d 905, 908 (Tex. App.—Houston [1st Dist.] 1988, no pet.) (a constructive trust is awarded when it is unconscientious for the holder of legal title to retain and enjoy the beneficial interest in real property). Furthermore, the Northern District of Texas completely divested both Carol Miller Price and David Price of any alleged interest in the Marquette Property and vested such interest in Evans.

Section 12.007 provides that "during the pendency of an action involving title to real property, the *establishment of an interest in real property*, or the enforcement of an encumbrance against real property, a party to the action who is seeking affirmative relief may file for record with the county clerk of each county where a part of the property is located a notice that the action is pending." TEX. PROP. CODE ANN. § 12.007 (Vernon 2004) (emphasis added). The lis pendens statute gives litigants a method to constructively notify anyone taking an interest in real property that a claim is being litigated against the property. *In re Collins*, 172 S.W.3d 287, 292 (Tex. App.—Fort Worth 2005, orig. proceeding); *Garza v. Pope*, 949 S.W.2d 7, 8 (Tex. App.—San Antonio 1997, orig. proceeding). A recorded lis pendens is notice to the world of its contents regardless of whether service has been made on the parties to the proceeding. *See* TEX. PROP. CODE ANN. § 13.004 (Vernon 2004). To satisfy section 12.007, the suit on which the lis pendens is based must claim a direct interest in real property, not a collateral one. *In re Collins*, 172 S.W.3d at 293.; In re Wolf, 65 S.W.3d 804, 805 (Tex. App.—Beaumont 2002, orig. proceeding). In other words, the property against which the lis pendens is filed must be the subject matter of the underlying lawsuit. *In re Fitzmaurice*, 141 S.W.3d 802, 805 (Tex. App.—Beaumont 2004, orig. proceeding); *In re Wolf*, 65 S.W.3d at 806 (both stating an "adequate nexus" must exist between the claim and the subject property).

Long Beach contends that Evans's request for title in the Garro Litigation was only a "plea for relief

requested" and merely collateral. We disagree. To determine the validity of a lis pendens on appeal, this Court must look to appellee's pleadings to determine whether the suit sought to establish an interest in the real property involved, entitling Evans to file a lis pendens. *First Nat. Petroleum Corp. v. Lloyd*, 908 S.W.2d 23, 25 (Tex. App.—Houston [1st Dist.] 1995, no pet.); *Teve Holdings Ltd. v. Jackson*, 763 S.W.2d 905, 907 (Tex. App.—Houston [1st Dist.] 1988, no pet.). The first amended complaint in the Garro Litigation states that Price and Durham Capital, among others, held real property purchased with TLC's funds in a constructive trust for the benefit of TLC. In addition, the pleading states, "Garro and Price spent millions of dollars of the funds they retained on travel, living expenses, and the purchase of luxury homes. In so doing, Defendants wrongfully detained funds belonging to TLC and spent those funds for their own personal benefit." In his prayer for relief for fraud and deceit, Evans asked the California federal court "to convey to TLC" any purchases made with TLC's funds. Following the allegations that TLC's funds were converted for the purchase of real property, Evans requested the court to (1) declare "any other purchases or investments made with TLC's funds [be held] in a constructive trust for the benefit of TLC," (2) declare "TLC the owner . . . of any other purchases or investments made with TLC's funds," and (3) order a conveyance to TLC of "any other purchases or investments made with TLC's funds."

Where the pleadings seek a constructive trust for property and pray that an interest be granted in that

property, the notice of lis pendens against that property is valid. *Lloyd*, 908 S.W.2d at 24-25. Because Evans seeks a constructive trust to obtain a conveyance of an interest in real property, and not merely an interest in the proceeds, the request for a constructive trust seeks a direct interest in real property. *Cf. Moss v. Tennant*, 722 S.W.2d 762, 763 (Tex. App.—Houston [14th Dist. 1986, no pet.) (pleading that a lien be imposed against property was essentially a prayer for a judgment lien, affecting the property only collaterally, and did not support lis pendens). *See also Teve*, 763 S.W.2d at 908 (distinguishing *Moss* and concluding the lis pendens was proper due to the prayer for a constructive trust and an interest in the property in the underlying pleadings). Thus, Evans's notice of lis pendens against the Marquette Property is valid. *Lloyd*, 908 S.W.2d at 25; Teve, 763 S.W.2d at 908-09.

4. Long Beach's Fifth Argument-Whether The Lis Pendens Provided Constructive Notice

Long Beach next contends the record does not reflect that the lis pendens was recorded prior to the effective date of Long Beach's lien. Thus, Long Beach argues the lis pendens did not provide the necessary constructive notice prior to the effective date of Long Beach's lien on the Marquette Property. Long Beach further asserts that absent proof that Evans's lis pendens was recorded prior to the effective date of Long Beach's security instrument, Long Beach is entitled to summary judgment or, alternatively, fact issues exist which preclude summary judgment in favor of Evans.

Although the record reflects the lis pendens was recorded on July 24, 2002, the same date Long Beach's deed of trust was executed, the record also reflects the lis pendens was filed on July 23, 2002. "An instrument filed with a county clerk for recording is considered recorded from the time that the instrument is filed." TEX. LOCAL GOV'T CODE ANN. § 191.003 (Vernon 2008). A notice of lis pendens is effective from the time it is filed or, in this case, July 23, 2002. *See* TEX. PROP. CODE ANN. § 13.004 (Vernon 2004). Thus, Evans's lis pendens was filed and deemed recorded prior to the date Long Beach executed its deed of trust on July 24, 2002 or filed the deed of trust on August 2, 2002. Thus, the record establishes that Evans's lis pendens was recorded prior to the effective date of Long Beach's security instrument. Long Beach's lien claim is, therefore, subordinate to Evans's lis pendens as a matter of law. *See Countrywide Home Loans, Inc. v. Howard*, 240 S.W.3d 1, 4 (Tex. App.—Austin 2007, no pet.).

Still, Long Beach argues lis pendens provides constructive notice only upon recording and proper indexing. Long Beach asserts that "obviously, it was indexed sometime after it was recorded",[8] so there was no constructive notice given prior to the time of execution of Long Beach's deed of trust. However, we have already concluded that the filing of the lis pendens was sufficient to place Long Beach on notice of Evans's interest in the Marquette Property. *See* TEX. PROP. CODE ANN. § 13.004 (Vernon 2004). There is no

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8. The record before us does not include a copy of the index.

provision in section 13.004 which requires the index to be made as a condition precedent to the validity of the notice. *See Pope v. Beauchamp*, 206 S.W. 928, 931 (Tex. 1918) (discussing a predecessor to section 13.004 and concluding it was unnecessary for one to show that the lis pendens was indexed in order to render the notice of lis pendens effective).

Thus, the summary judgment evidence demonstrates that there is no genuine issue of material fact precluding summary judgment in favor of Evans. We overrule Long Beach's first and second issues.

***Issue Three***

In its third issue, Long Beach challenges the award of attorneys' fees to Evans. Long Beach contends the trial court improperly awarded fees under the Declaratory Judgment Act when, in fact, Evans's lawsuit was one to quiet title and fees are not permitted in suits to quiet title. *See Southwest Guar. Trust Co. v. Hardy Rd. 13.4 Joint Venture*, 981 S.W.2d 951, 952-53 (Tex. App.—Houston [1st Dist.] 1998, pet. denied) (attorney's fees not available in suit to quiet title or to remove cloud on title).

Although we agree with Long Beach that Evans's pleading describes the claim as a cloud on title, Long Beach failed to raise this issue before the trial court. Issues a non-movant contends avoid the movant's entitlement to summary judgment must be expressly presented by written answer to the motion or by other

written response to the motion. *McConnell v. Southside Indep. School Dist.*, 858 S.W.2d 337, 341 (Tex. 1993); see also TEX. R. APP. P. 33.1 (To preserve a complaint for appellate review, a party must have presented its complaint to the trial court "by a timely request, objection, or motion that . . . stated the grounds for the ruling that the complaining party sought . . . with sufficient specificity to make the trial court aware of the complaint.") We cannot reverse a trial court's judgment based on an issue not presented to the trial court. *Westland*, 705 S.W.2d at 696. Thus, we overrule Long Beach's third issue.

We affirm the judgment of the trial court.

DAVID L. BRIDGES

JUSTICE

## APPENDIX B — FINAL JUDGMENT OF THE DISTRICT COURT OF DALLAS COUNTY, TEXAS, 44TH JUDICIAL DISTRICT DATED JANUARY 22, 2007

**IN THE DISTRICT COURT**
**OF DALLAS COUNTY, TEXAS**

CAUSE NO. 05-05219-B

ROBB EVANS, AS RECEIVER FOR
TLC AMERICA, INC.,

Plaintiff,

v.

LONG BEACH MORTGAGE COMPANY,

Defendant.

**FINAL JUDGMENT**

On this day came to be heard Plaintiff Robb Evans, as Receiver for TLC America, Inc.'s ("Plaintiff") Motion for Summary Judgment and Brief in Support ("Plaintiff's Motion") seeking judgment against Defendant Long Beach Mortgage Company ("Defendant"). The Court also heard Defendant's Motion for Summary Judgment ("Defendant's Motion"). Plaintiff and Defendant appeared by and through their attorneys of record and announced ready for trial. The Court determined it had jurisdiction over the subject matter and the parties to this proceeding.

*Appendix B*

The Court, having considered Plaintiff's Motion, the summary judgment evidence submitted by the parties, argument of counsel, and applicable law, finds that Plaintiff's Motion should be, and is in all things, **GRANTED.** The Court, having considered Defendant's Motion, the summary judgment evidence submitted by the parties, argument of counsel, and applicable law, the Court finds that Defendant's Motion should be, and is in all things, **DENIED.** The Court finds that there are no genuine issues of material fact and that Plaintiff is entitled to a judgment against Defendant as a matter of law. It is, therefore,

**ORDERED** that Plaintiff Robb Evans, as Receiver for TLC America, Inc.'s Motion for Summary Judgment and Brief in Support is hereby **GRANTED**. It is further

**ORDERED** that Defendant Long Beach Mortgage Company's Motion for Summary Judgment is hereby **DENIED.** It is further

**ORDERED** that Plaintiff Robb Evans, as Receiver for TLC America, Inc.'s Notice of Lis Pendens, filed on July 23, 2002 and recorded on July 24, 2002 in Volume 2002 143, Pages 03654 – 03656 of the Real Property Records of Dallas County, Texas, is valid and effective with respect to the real property located in Dallas County, Texas and described as 7843 Marquette Street, Dallas, Texas 75225-4400, Caruth Village, Phase 2, Blk R/5450 LT 10, VOL 99209/6210 DD 102399 CO-DALLAS (the "Marquette Property"). It is further

*Appendix B*

**ORDERED** that Plaintiff Robb Evans, as Receiver for TLC America, Inc.'s Notice of Lis Pendens, filed on July 23, 2002 and recorded on July 24, 2002 in Volume 2002 143, Pages 03654 – 03656 of the Real Property Records of Dallas County, Texas, is superior to Defendant Long Beach Mortgage Company's Texas Home Equity Security Instrument, dated July 24, 2002, signed by David H. Price and Wife, Carol M. Price, as grantor, and Troy Gotschall as trustee, and Long Beach Mortgage Company, A Corporation, as beneficiary, and filed and recorded on August 2, 2002 in Volume 2002 150, Pages 06097-06109 of the Real Property Records of Dallas County, Texas, with respect to the Marquette Property. It is further

**ORDERED** that Defendant Long Beach Mortgage Company's Texas Home Equity Security Instrument, dated July 24, 2002, signed by David H. Price and Wife, Carol M. Price, as grantor, and Troy Gotschall as trustee, and Long Beach Mortgage Company, A Corporation, as beneficiary, and filed and recorded on August 2, 2002 in Volume 2002 150, Pages 06097-06109 of the Real Property Records of Dallas County, Texas, is invalid and of no force or effect with respect to the Marquette Property. It is further

**ORDERED** that all title and interest to the Marquette Property, more fully described as 7843 Marquette Street, Dallas, Texas 75225-4400, Caruth Village, Phase 2, Blk RI5450 LT 10, VOL 99209/6210 DD 102399 CO-DALLAS, is hereby quieted in Plaintiff Robb Evans, as Receiver for TLC America, Inc. It is further

**ORDERED** that all title and interest to the Marquette Property, more fully described as 7843 Marquette Street, Dallas, Texas 75225-4400, Caruth Village, Phase 2, Blk R/5450 LT 10, VOL 99209/6210 DD 102399 CO-DALLAS, is fully vested in Plaintiff Robb Evans, as Receiver for TLC America, Inc. It is further

**ORDERED** that Plaintiff Robb Evans, as Receiver for TLC America, Inc. is hereby authorized to immediately sell the Marquette Property, more fully described as 7843 Marquette Street, Dallas, Texas 75225-4400, Caruth Village, Phase 2, Blk R/5450 LT 10, VOL 99209/6210 DD 102399 CO-DALLAS. It is further

**ORDERED** that Plaintiff Robb Evans, as Receiver for TLC America, Inc. have and recover judgment against Defendant Long Beach Mortgage Company for its reasonable and necessary attorneys' fees and expenses that are equitable and just in the amount of $41,071.00, for which let execution issue. It is further

**ORDERED** that Plaintiff Robb Evans, as Receiver for TLC America, Inc. have and recover judgment against Defendant Long Beach Mortgage Company for additional reasonable attorneys' fees in the following principal amounts: $15,000.00 in the event a motion for new trial is filed and denied; $25,000.00 in the event of an unsuccessful appeal to the Court of Appeals; an additional $25,000.00 in the event a petition for review is filed with the Texas Supreme Court and denied; and an additional $10,000.00 in the event the petition for

review is granted by the Texas Supreme Court, or briefs on the merits are requested, and the judgment is upheld, for which let execution issue. It is further

**ORDERED** that all costs of court are taxed against Defendant Long Beach Mortgage Company, for which let execution issue. It is further

**ORDERED** that Plaintiff Robb Evans, as Receiver for TLC America, Inc. shall have and recover from Defendant Long Beach Mortgage Company post-judgment interest on all amounts awarded herein at the rate of 8.25% per annum from the date of this judgment until paid in full, plus all additional costs of this action, for all of which let execution issue. It is further

**ORDERED** that Plaintiff Robb Evans, as Receiver for TLC America, Inc. shall have all writs and other process necessary to enforce this judgment. It is further

**ORDERED** that this Judgment is intended to be **FINAL** for purposes of appeal. This Judgment disposes of all parties to this action and all claims. All relief requested by any party to this action not expressly granted herein is **DENIED**.

Signed this 22nd day of January, 2007.

s/ Carlos R. Cortez
THE HONORABLE CARLOS CORTEZ

## APPENDIX C — ORDER OF THE SUPREME COURT OF TEXAS DENYING PETITION FOR REHEARING DATED JANUARY 15, 2010

**SUPREME COURT OF TEXAS**

**09-0630**

**LONG BEACH MORTGAGE COMPANY**

**v.**

**ROBB EVANS, AS RECEIVER FOR TLC AMERICA, INC.**

**January 15, 2010, Order Pronounced**

**OPINION**

MOTIONS FOR REHEARING OF THE FOLLOWING PETITIONS FOR REVIEW ARE DENIED.

Supreme Court, U.S.
FILED
MAY 19 2010
OFFICE OF THE CLERK

No. 09-1258

# In The
# Supreme Court of the United States

LONG BEACH MORTGAGE COMPANY,

*Petitioner,*

v.

ROBB EVANS, AS RECEIVER
FOR TLC AMERICA, INC.,

*Respondent.*

**On Petition For A Writ Of Certiorari To The Court Of Appeals Of Texas, Fifth District**

## BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

Does this Court have jurisdiction over this case and should the Petition for a Writ of Certiorari be granted where:

a) This case concerns resolving the priority of claims to real property under Texas law, with no important federal issues to be decided by this Court.

b) The decision of the intermediate Texas appeals court finding that Respondent and the California receivership court had proper in rem jurisdiction over the real property at issue is correct and consistent with federal law, including federal circuit authorities, which are likewise in harmony. Respondent complied with 28 U.S.C. Section 754's requirements, timely filing of his order of appointment in Texas.

c) Petitioner admits that 28 U.S.C. Sections 754 and 1692 provide a receiver jurisdiction over receivership assets no matter where they are located. Sections 754 and 1692 are congressional mandates governing the powers and jurisdiction of federal receivers and receivership courts, trumping the local action doctrine and demonstrating that Petitioner's implied preemption arguments are meritless.

## CORPORATE DISCLOSURE STATEMENT

Robb Evans is a federally appointed receiver for TLC America, Inc. Robb Evans is an individual. TLC America, Inc. is neither a subsidiary nor an affiliate of a publicly held company. No publicly owned company owns 10% or more of the shares of TLC America, Inc.

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## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. Section 754 (2006) provides:

A receiver appointed in any civil action or proceeding involving property, real, personal or mixed, situated in different districts shall, upon giving bond as required by the court, be vested with complete jurisdiction and control of such property with the right to take possession thereof.

He shall have capacity to sue in any district without ancillary appointment, and may be sued with respect thereto as provided in section 959 of this title.

Such receiver shall, within ten days after the entry of his order of appointment, file copies of the complaint and such order of appointment in the district court for each district in which property is located. The failure to file such copies in any district shall divest the receiver of jurisdiction and control over all such property in that district.

28 U.S.C. Section 1692 (2006) provides:

In proceedings in a district court where a receiver is appointed for property, real, personal, or mixed, situated in different districts, process may issue and be executed in any such district as if the property lay wholly within one district, but orders affecting the

property shall be entered of record in each of such districts.

## STATEMENT OF THE CASE

Because this case solely concerns the priority of interests to certain real property located in Dallas, Texas (the "Marquette Property") under Texas law, there are no issues for this Court to review. Respondent Robb Evans, as Receiver for TLC America, Inc. ("Respondent" or the "Receiver") was appointed as receiver to represent elderly investors who were defrauded in connection with a real estate investment scheme. The Receiver was appointed to return assets to the receivership estate for the benefit of the investors, who have been waiting nearly ten years for final disposition of the Marquette Property, the last remaining receivership asset. In connection with the Marquette Property, the Receiver filed a lis pendens in the Dallas County Real Property Records long before Petitioner Long Beach Mortgage Company ("Petitioner" or "Long Beach") filed a mortgage lien on the Property. Petitioner refused to release its later filed and recorded lien, and the Receiver was forced to file a declaratory judgment action in Texas state court against Long Beach to have his lis pendens declared superior to Long Beach's lien claim.

Three levels of Texas courts, from the Dallas trial court to the Texas Supreme Court, which denied review, have now correctly decided that the Receiver's

lis pendens and resulting interest in the Marquette Property are superior to Petitioner's lien claim, which was declared void and of no force or effect concerning the Property. Ultimately, this case arises purely as a function of state law governing priority of claims to real property under state law. Long Beach's Petition filed before this Court is simply its last-ditch effort to delay the inevitable and to delay disposition of the Marquette Property, which the Receiver has been waiting to sell as the fully vested title holder for years now. Significantly, if the Court were to review this case, its decision would only affect the parties' narrow priority dispute, a state law issue outside the jurisdiction of this Court.

Recognizing that it has not and cannot win the priority dispute to the Marquette Property with respect to its lien claim, which was correctly determined to be inferior to the Receiver's lis pendens, Petitioner glosses over the state law that is at the core of this case and has instead invented "federal questions" that are inapplicable and invalid. As such, and in its misguided quest to invalidate the Receiver's superior lis pendens, Long Beach improperly attempts to collaterally attack the final judgment of the U.S. District Court for the Central District of California (the "California Court"), where the court entered a constructive trust on the Marquette Property, one of the properties to which the Receiver sought to be deemed the rightful owner in the action forming the basis of the Receiver's lis pendens. Long Beach improperly argues that the Receiver and the

California Court lacked jurisdiction over the Marquette Property because the Receiver allegedly failed to timely file the order appointing him Receiver of TLC America, Inc. Long Beach, as it has done at every stage of this appeal, misconstrues the law and the facts in its Petition. Petitioner cannot deny, and in fact admits, that 28 U.S.C. Section 754 authorizes federal district courts to exercise intradistrict in rem jurisdiction over property located in other districts. 28 U.S.C. §§ 754, 1692 (2006). As a result of this concession, Long Beach has resorted to technical arguments that the Receiver allegedly failed to comply with the statutory requirements for invoking jurisdiction. Long Beach's arguments are entirely incorrect—the Receiver complied with the requirements of Section 754 and his appointment order was timely filed in Texas.

Further, Long Beach's assertion that that the opinion of the Fifth District Court of Appeals in Dallas, Texas (the "Dallas Appeals Court") is in conflict with federal law or any decision of the federal circuit courts is also incorrect and insupportable. Petitioner's arguments are simply smoke and mirrors. The "conflict" presented by Long Beach is entirely concocted and does not meet the standards for this Court's review under Supreme Court Rule 10, which Long Beach tellingly ignores in its Petition. The Dallas Appeals Court correctly applied 28 U.S.C. Sections 754 and 1692 in a manner consistent with the language of those statutes and federal case law, and correctly held that the California Court had in rem jurisdiction over the Marquette Property. 28 U.S.C. §§ 754, 1962 (2006); *see* U.S. SUP. CT. R. 10. There is

harmony between and among the Dallas Appeals Court and the federal courts regarding the interpretation and application of Section 754. Moreover, Petitioner's unfounded complaint that the courts merely misapplied Section 754 does not present a sufficient basis for review. *See* U.S. SUP. CT. R. 10. (stating that "a petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law.").

Although Petitioner admits in its Petition that Sections 754 and 1692 authorize federal district courts to exercise intradistrict in rem jurisdiction over property located elsewhere, in its second argument, Petitioner conveniently ignores those statutes and asserts instead that the local action doctrine alone governs jurisdiction in cases such as this one. But Petitioner cannot change the jurisdictional mandate expressed by Congress in Sections 754 and 1692 by ignoring it, and this Court should not entertain such a constitutionally specious argument by granting review.

Petitioner's final argument regarding implied preemption also fails to meet the standard for review because it neither presents a state/federal conflict nor an issue of first impression. U.S. SUP. CT. R. 10. Any conflict with the local action doctrine imagined by Long Beach is based in Sections 754 and 1692, congressional mandates that specifically govern the powers and jurisdiction of federal receivers and receivership courts and trump the local action doctrine, a concept of common law.

Because Petitioner fails to present any issues worthy of this Court's consideration and fails to meet the standard for review by this Court, its Petition for a Writ of Certiorari should be denied.

## BACKGROUND FACTS

### I. Robb Evans is Appointed Receiver for the Assets of TLC America, Inc.

In 2000, the Securities and Exchange Commission, in *Sec. & Exch. Comm'n v. TLC Investments & Trade Co., et al.*, Case No. SACV 00-960-DOC, in the U.S. District Court for the Central District of California (the "SEC Litigation"), brought suit against TLC America, Inc. ("TLC America") and related business entities and individuals for federal securities laws violations for the misuse and diversion of over $28 million in investor funds.[1] In the SEC Litigation, the California federal court initially appointed Robb Evans as Temporary Receiver on October 4, 2000 (the "October 4, 2000 Order").[2] This temporary appointment order gave Robb Evans the "full powers of an equity receiver . . . with full power over all funds, assets, collateral, [and] premises . . . of TLC."[3] The

[1] C.R. Vol. 2, p. 67. "C.R." refers to the Clerk's Record, which consists of five separate volumes filed in the Dallas Appeals Court. Citations to Respondent's Appendices, which are attached, are denoted herein as "Resp. App."

[2] C.R. Vol. 3, pp. 423, 425, 432-34; Resp. App. at 3-7.

[3] C.R. Vol. 3, p. 432; Resp. App. at 4.

October 4, 2000 Order also immediately authorized the Receiver to "have access to and to collect and to take custody . . . of all assets . . . of TLC" and "to take such action as is necessary and appropriate to preserve . . . any assets of TLC."[4] This initial order of appointment created a receivership estate for the assets of TLC America, and it established Robb Evans as the Receiver of that estate. The October 4, 2000 Order *did not provide a date for any expiration* of the receivership estate or the establishment of Robb Evans as Receiver of TLC America.[5] On October 13, 2000, the Receiver filed his initial order of appointment and the Complaint in the SEC Litigation in the United States District Court for the Northern District of Texas.[6]

On November 1, 2000, the court in the SEC Litigation entered an order appointing Robb Evans as Permanent Receiver of TLC America (the "November 1, 2000 Order").[7] The November 1, 2000 Order continued the same receivership powers and authorities imbued in Robb Evans by the October 4, 2000 Order.[8] The November 1, 2000 Order likewise continued the receivership estate initially created by the October 4, 2000 Order.[9] On December 20, 2000, the Receiver

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[4] C.R. Vol. 3, pp. 432-33; Resp. App. at 4-6.

[5] C.R. Vol. 3, pp. 422-42; Resp. App. at 3-7.

[6] C.R. Vol. 3, pp. 423, 443, 485; Resp. App. at 1, 7.

[7] C.R. Vol. 3, pp. 463, 471-74; Resp. App. at 10-15.

[8] C.R. Vol. 3, pp. 471-74; Resp. App. at 11-14.

[9] *Id.*

mailed this order of permanent appointment to the United States District Court for the Northern District of Texas for filing.[10] On January 2, 2001, the Clerk of the United States District Court for the Northern District of Texas stamped the order as received.[11]

## II. The Receiver Sues to Recover TLC America's Property.

The Receiver then brought suit to recover TLC America's property in *Robb Evans, as Receiver for TLC America, Inc. v. James F. Garro, David Price, et al.*, Case No. SACV 01-6466, in the U.S. District Court for the Central District of California (the "Garro Litigation").[12] The Receiver asserted claims of fraud, conversion, negligence and breach of fiduciary duty.[13] The Receiver also sought the imposition of a constructive trust on property purchased with funds stolen from TLC America.[14] Importantly, the Receiver did not simply plead constructive trust to satisfy any money judgment he received on his other causes of action. Rather, the Receiver requested an order declaring that the defendants held purchases or investments made with TLC America funds in a constructive trust for the benefit of TLC America and

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[10] C.R. Vol. 3, p. 462; Resp. App. at 8.

[11] C.R. Vol. 3, pp. 462, 463; Resp. App. at 8.

[12] C.R. Vol. 2, pp. 66, 67.

[13] C.R. Vol. 2, pp. 67, 102.

[14] C.R. Vol. 2, pp. 67, 139-40.

declaring TLC America the owner of the purchases or investments made with TLC America funds.[15] Thus, on the face of the Receiver's complaint, the Receiver sought an interest in any and all property purchased with TLC's funds.

## III. The Receiver Learns of the Marquette Property and Files a Lis Pendens.

Specifically, over $2.5 million of TLC America's funds had been wired into a Durham Capital Group, Inc. ("Durham") bank account controlled by David Price, the President of Durham, and his now former wife, Carol Miller Price (collectively, the "Prices").[16] During the course of the Garro Litigation, the Receiver discovered that over $1 million of the funds transferred into the Durham account controlled by David Price and Carol Miller Price were diverted into an account separately controlled by Carol Miller Price.[17] Carol Miller Price then used this money to purchase the Marquette Property.[18] Through discovery in the Garro Litigation, the Receiver learned of the Marquette Property in July 2002.[19] Immediately upon discovering the Marquette Property, the Receiver filed a Notice of Lis Pendens providing

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[15] C.R. Vol. 2, pp. 139-40.

[16] C.R. Vol. 2, p. 284.

[17] C.R. Vol. 2, p. 285.

[18] C.R. Vol. 2, pp. 285-86.

[19] C.R. Vol. 2, pp. 67-68, 285-86.

notice of his interest and rights in the Marquette Property.[20] The Receiver filed the Notice of Lis Pendens on July 23, 2002.[21]

## IV. Long Beach Loans Money to the Prices and Records a Lien.

On July 24, 2002, one day after the Receiver's lis pendens was filed, the Prices entered a $400,000 home equity loan with Long Beach.[22] A deed of trust on the Marquette Property secured this loan.[23] On August 2, 2002, Long Beach filed the deed of trust in the Dallas County Real Property Records, creating a lien claim on the Marquette Property.[24] It is undisputed that the Prices defaulted on their loan with Long Beach, and now Long Beach's claim has clouded title to the Marquette Property. Tellingly, Long Beach *never* foreclosed on its claimed interest in the Marquette Property.[25]

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[20] C.R. Vol. 2, pp. 67-68; Resp. App. at 16-17.

[21] C.R. Vol. 2, pp. 68, 145-48; Resp. App. at 16.

[22] C.R. Vol. 2, pp. 68, 151-64; Resp. App. at 18.

[23] *Id.*

[24] *Id.*

[25] C.R. Vol. 2, p. 68.

## V. A Constructive Trust is Imposed on the Marquette Property.

After a trial on the merits, the California federal court, on or about December 16, 2002, in the Garro Litigation found David Price liable for the fraudulent transfer of TLC America's funds in the amount of $3,505,001.59.[26] The court also imposed a constructive trust "over the real property, fixtures and furnishings located at 7843 Marquette, Dallas, Texas."[27] The court further held that "Defendants . . . and their agents, servants, assigns and those acting in concert with them are enjoined from engaging in any activities to transfer, secret or dissipate these assets."[28]

The California federal court also made findings of fact that further demonstrated the direct connection between the Marquette Property and the Garro Litigation.[29] Based on these facts, the court imposed a constructive trust on the Marquette Property "in order to prevent the unjust enrichment of" David Price.[30] Importantly, the court in the Garro Litigation specifically found that it had jurisdiction over the case based on 28 U.S.C. Section 1331 and the broad jurisdictional grant of 28 U.S.C. Section 754, which extended the court's ancillary jurisdiction anywhere

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[26] C.R. Vol. 2, pp. 68-69, 174-75, 191-92.

[27] C.R. Vol. 2, pp. 175, 191-92.

[28] *Id.*

[29] C.R. Vol. 2, pp. 184-85.

[30] C.R. Vol. 2, p. 191.

in the United States that receivership property is located.[31]

## VI. The Receiver is Authorized to Sell the Marquette Property "Free and Clear."

After the constructive trust was imposed in the Garro Litigation, in 2003, the Receiver petitioned the court in the SEC Litigation for permission to sell the Marquette Property.[32] The court in the SEC Litigation granted the Receiver permission to sell the Marquette Property "free and clear of all liens and interests therein, with such liens and interests to attach to the net proceeds of sale."[33] The court further ordered that "the sale proceeds shall be held in trust by the Receiver pending resolution of all disputes concerning distribution of the sale proceeds and any claimed interests in the Property."[34] The court also ordered David Price, Carol Price, Long Beach and any other third party claimant to file a claim with the court within 60 days if they intended to assert an interest in the sale proceeds.[35] The court authorized the Receiver to "perform any and all . . . acts necessary to effectuate the orderly sale of the Property."[36]

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[31] C.R. Vol. 2, p. 188.

[32] C.R. Vol. 2, pp. 69, 197-239.

[33] C.R. Vol. 2, pp. 242-44.

[34] C.R. Vol. 2, p. 244.

[35] C.R. Vol. 2, p. 243.

[36] *Id.*

The Receiver originally arranged to sell the Marquette Property to Sally K. Johnson for $838,000.[37] Given the various claims to the Marquette Property, the sales contract with Ms. Johnson was extended several times while the outstanding claims to the Marquette Property are resolved.[38] As a result of the successive appeals and the continued delays caused by Long Beach, the sale to Ms. Johnson has since been lost.

## VII. Full Fee Simple Title to the Marquette Property is Vested in the Receiver.

Carol Miller Price, a Dallas resident, ignored the California federal court's order in the SEC Litigation and did not file a claim in that proceeding.[39] She still asserted a claim to the title to the Marquette Property, clouding title and thwarting the Receiver's efforts to secure title insurance to sell the Marquette Property to Ms. Johnson.[40] The Receiver then registered the judgment imposing the constructive trust for enforcement in the U.S. District Court for the Northern District of Texas in *Robb Evans, as Receiver for TLC America, Inc. v. James F. Garro, David Price, et al.*, Case No. 3:03-MC-00022-M.[41] In 2004, the

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[37] C.R. Vol. 2, pp. 69, 214.

[38] C.R. Vol. 2, p. 69.

[39] *Id.*

[40] *Id.*

[41] *Id.*

Northern District of Texas divested David Price and Carol Miller Price of all title and interest to the Marquette Property and vested full fee simple title to the Marquette Property in the Receiver.[42] The court also authorized the Receiver to sell the Marquette Property and to convey full fee simple title to the Marquette Property.[43] The court's orders enforcing the constructive trust against the Prices reinforce the fact that neither David Price nor Carol Miller Price had a legitimate claim to the Marquette Property to begin with. The Marquette Property was purchased by the Prices with stolen money, and as a result, the Prices were merely holding the property in trust for Robb Evans, as Receiver for TLC America, the rightful owner.

## VIII. Long Beach's Lien Claim Clouds Title to the Marquette Property.

Long Beach did not file a claim in the SEC Litigation pursuant to the California federal court's March 30, 2004 Order on Amended Ex Parte Application.[44] Long Beach has asserted that it did not file a claim because it allegedly was not served with the Order on Amended Ex Parte Application, providing the 60-day deadline to assert a claim to the sale

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[42] C.R. Vol. 2, pp. 69-70, 247-48, 251-53.

[43] *Id.*

[44] C.R. Vol. 2, p. 70.

proceeds.[45] Therefore, the California federal court did not resolve Long Beach's lien claim, which has clouded title to the Marquette Property and impeded the sale to Ms. Johnson since title insurance could not be produced to close the sale to Ms. Johnson.[46]

## IX. The Receiver Files Declaratory Suit in Texas State Court and Prevails in the Trial Court, the Dallas Appeals Court and the Texas Supreme Court.

The Receiver filed a declaratory judgment action against Long Beach in the Dallas County district court to resolve the competing claims to the Marquette Property.[47] On January 22, 2007, the trial court granted the Receiver's summary judgment motion and entered a Final Judgment in favor of the Receiver, declaring the Receiver's lis pendens valid, effective, and superior to Petitioner's lien claim to the Marquette Property; declaring Petitioner's lien claim void and of no force or effect concerning the Property; vesting and quieting full title and interest in the property in Respondent; authorizing Respondent to

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[45] *Id.*

[46] *Id.*

[47] C.R. Vol. 1, pp. 7-13.

sell the Property; and awarding Respondent attorneys' fees.[48]

The Dallas Appeals Court affirmed the trial court's judgment, specifically holding that Respondent and the California Court had jurisdiction over the Marquette Property pursuant to 28 U.S.C. Section 754 and applicable Federal authority. *Long Beach Mortg. Co. v. Evans*, 284 S.W.3d 406, 412 (Tex. App.—Dallas 2009), *reh'g overruled* (June 17, 2009), *review denied* (Nov. 20, 2009), *cert. filed* (Apr. 15, 2010).[49] Petitioner filed a Petition for Review with the Texas Supreme Court, Respondent filed a Response Brief, and the court denied the Petition.[50] Now, Long Beach has frivolously continued its successive appeals to this Court, filing an unwarranted and insupportable Petition for a Writ of Certiorari, which should be summarily denied.

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[48] C.R. Vol. 4, pp. 631-34; Pet. App. B. Citations to Petitioner's Appendices, which are attached to the Petition for a Writ of Certiorari, are denoted herein as "Pet. App."

[49] Pet. App. A.

[50] Pet. App. C.

## LONG BEACH'S PETITION SHOULD BE DENIED

### I. The Dallas Appeals Court's Decision that the Receiver Properly Invoked In Rem Jurisdiction under 28 U.S.C. Section 754 is Fully Consistent with and Supported by the Federal Circuits, Which are in Harmony Regarding the Correct Interpretation and Application of Section 754. Petitioner's Asserted "Conflict" is Illusory.

Supreme Court Rule 10 and this Court's established opinions clearly provide that review is unwarranted on the basis of a conflict between the courts where the asserted conflict is illusory. *See* U.S. SUP. CT. R. 10(b), (c); *Rice v. Sioux City Mem'l Park Cemetery*, 349 U.S. 70, 79 (1955). A petition for writ of certiorari should only be granted in cases "where there is a real and embarrassing conflict of opinion and authority between the [courts]." *Rice*, 349 U.S. at 79. In the case at hand, there is no such conflict. Contrary to Long Beach's insinuations, there is no conflict between the Dallas Appeals Court's opinion and federal decisions concerning the interpretation or application of Section 754. Further, the federal circuits consistently apply and interpret Section 754.

#### A. The Receiver Timely Complied with Section 754.

Long Beach has repeatedly acknowledged and admitted that, pursuant to 28 U.S.C. Sections 754 and 1692, the Receiver is empowered to collect assets

anywhere in the United States. Long Beach again concedes this point in its Petition to this Court. The territorial jurisdiction of the receivership court, here the U.S. District Court for the Central District of California, extends to any district where property of the receivership estate may be located, even if the property is located in different states across the nation. *See Haile v. Henderson Nat'l Bank*, 657 F.2d 816, 822, 824 (6th Cir. 1981), *cert. denied*, *First Nat'l Bank of Alabama-Huntsville v. Haile*, 455 U.S. 949 (1982); *Sec. & Exch. Comm'n v. Cook*, No. 3-01-CV-0480-R, 2001 WL 803791, at *2 (N.D. Tex. July 11, 2001); *Select Creations, Inc. v. Paliafito Am., Inc.*, 852 F. Supp. 740, 780-81 (E.D. Wis. 1994) (rejecting reliance on state law and the argument that Court through the Receiver could not reach property located outside of Wisconsin).

Section 754 provides, in pertinent part, that a receiver:

> . . . shall, within ten days after the entry of his order of appointment, file copies of the complaint and such order of appointment in the district court for each district in which property is located. The failure to file such copies in any district shall divest the receiver of jurisdiction and control over all such property in that district.

28 U.S.C. § 754. Section 1692 provides:

> In proceedings in a district court where a receiver is appointed for property, real, personal, or mixed, ***situated in different***

> ***districts***, process may issue and be executed in any such district as if the ***property lay wholly within one district***, but orders affecting the property shall be entered of record in each of such districts.

28 U.S.C. § 1692 (emphasis supplied).

The Sixth Circuit in the *Haile* decision summed up the operation of these statutes:

> We begin with the undisputed proposition that the initial suit which results in the appointment of the receiver is the primary action and that any suit which the receiver thereafter brings in the appointment court in order to execute his duties is ancillary to the main suit. As such, the trial court has ancillary subject matter jurisdiction of every such suit irrespective of diversity, amount in controversy or ***any other factor which would normally determine jurisdiction***.

*See Haile*, 657 F.2d at 822 (emphasis supplied) (*citing Pope v. Louisville, New Albany & Chi. Ry. Co.*, 173 U.S. 573 (1899)).

The Sixth Circuit succinctly concluded that:

> The court in which the federal receiver is appointed thus has ancillary subject-matter jurisdiction of suits brought by the receiver in the execution of his duties, and the court's geographical jurisdiction is extended to all

> districts where receivership property is found.

*Id.* at 824.

Receivers are typically appointed in equity for the purpose of preserving and collecting property for the benefit of the receivership estate, established in this instance for the benefit of the victims of securities fraud. *See Liberte Capital Group, LLC v. Capwill*, 462 F.3d 543, 551 (6th Cir. 2006); *Eller Indus., Inc. v. Indian Motorcycle Mfg., Inc.*, 929 F. Supp. 369, 372 (D. Colo. 1995). The purpose of Sections 754 and 1692 is to provide a receiver and the receivership court with nationwide jurisdiction to make it easier to adjudicate interests in property that are subject to the receivership estate. Such broad jurisdiction is a well recognized concept in connection with bankruptcy trustees and bankruptcy courts, which have nationwide jurisdiction to adjudicate interests and claims to assets within the bankruptcy estate. *See Matter of Rimsat, Ltd.*, 98 F.3d 956, 961 (7th Cir. 1996) ("[T]he efficacy of the bankruptcy proceeding depends on the court's ability to control and marshal assets of the debtor wherever located"). Receivership estates, like bankruptcy estates, are so powerful that they even extend internationally. *See In re French*, 440 F.3d 145, 151 (4th Cir. 2006), *cert. denied*, *French v. Liebman*, 549 U.S. 815 (2006); *In re Gucci*, 309 B.R. 679, 681 (S.D.N.Y. 2004); *Citronelle-Mobile Gathering, Inc. v. Watkins*, 934 F.2d 1180, 1186-87 (11th Cir. 1991) (holding receiver had power to assert authority

over property in foreign country under order allowing such action as to both personal and real property).

Although Long Beach acknowledges the applicability of these statutes, it attempts to avoid them by claiming that the Receiver did not timely file his order of appointment within the ten-day period provided by Section 754. Long Beach's ultra-technical argument is simply incorrect.

Long Beach does not dispute that Robb Evans filed the October 4, 2000 Order appointing him Receiver of TLC America in the Northern District of Texas within the ten-day period provided by Section 754. The October 4, 2000 Order was filed in the Northern District of Texas on October 13, 2000, only nine days later.[51] Pursuant to Sections 754 and 1692, jurisdiction of the Receiver and the California federal court was, therefore, established upon the timely filing of the October 4, 2000 Order and the Receiver's Complaint in the Northern District of Texas on October 13, 2000. Importantly, the October 4, 2000 order ***never expired***.[52]

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[51] C.R. Vol. 3, p. 423; Resp. App. at 1, 3, 7.

[52] C.R. Vol. 3, pp. 422-42; Resp. App. at 3-7. The October 4, 2000 Order contained several separate orders, including an order granting a temporary restraining order (the "TRO") and the order of initial appointment of Robb Evans as receiver. Only the TRO, *not* the appointment order, expired under the terms of the Order and as required by Federal Rule of Civil Procedure 65.

Long Beach suggests that even after timely filing the initial order appointing him receiver, Robb Evans was required to re-file the order appointing him permanent receiver. Section 754, which does not distinguish between temporary and permanent orders, does not require this. 28 U.S.C. § 754. The legislative purpose behind Sections 754 and 1692 is to assist receivers with their duties, not to burden them with duplicative filing requirements for appointment orders.[53] The point of these statutes is to make the receiver's job easier in retrieving receivership assets to make the victims that a receiver represents whole again. *See Sec. & Exch. Comm'n v. Infinity Group Co.*, 27 F. Supp. 2d 559, 567 (E.D. Pa. 1998) (finding that the court, in a securities violations suit, had "'authority to grant the full panoply of equitable remedies so that the [victims] can obtain complete relief,'" including "disgorgement, asset freezes, ***appointments of receivers***, repatriation of assets, constructive trusts, and restitution.") (emphasis supplied). Significantly, Long Beach has consistently failed to present any case law that reads such a duplicative filing requirement into Section 754.

By filing the October 4, 2000 Order initially appointing him Receiver for TLC America in the

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[53] Indeed, it would be unjust to divest a receiver of jurisdiction where a receiver later discovers property in a jurisdiction that the receiver did not have knowledge of within the ten day time period. To do so would be unfair to the victims represented by the receiver.

Northern District of Texas on October 13, 2000, Robb Evans met the ten-day requirement of Section 754 and established his and the California Court's jurisdiction over the Marquette Property. It is irrelevant that the November 1, 2000 Order, which simply continued the receivership and the Receiver's power and authority established in the October 4, 2000 Order, was filed in the Northern District of Texas more than ten days after its entry. Jurisdiction had already been established by the filing of the October 4, 2000 Order.

### B. The Dallas Appeals Court's Determination that the Receiver Properly Invoked the California Court's Jurisdiction under Section 754 is Correct and Consistent with the Federal Circuits.

Based on the foregoing facts and the language of the statute, the Dallas Appeals Court correctly determined that the Receiver property invoked the California Court's jurisdiction under Section 754. Significantly, the decision is also consistent with the federal circuits that have opined on the application of Section 754's filing requirements. As such, there is no basis for review due to a "conflict" between the Dallas Appeals Court and the federal courts. *See* U.S. SUP. CT. R. 10; *Rice*, 349 U.S. at 79.

As stated, it is irrelevant under Section 754 that the permanent order of appointment, which continued the established jurisdiction of the California Court, was filed in the Northern District of Texas more than ten days after being entered. Even if the time limits of Section 754 applied to the Receiver's filing of the permanent appointment order, the case law consistently holds that any belated filing was effective to invoke jurisdiction under Section 754, given that Petitioner was not prejudiced as a result. *Sec. & Exch. Comm'n v. Am. Capital Invs., Inc.*, 98 F.3d 1133, 1136 (9th Cir. 1996), *cert. denied*, *Shelton v. Barnes*, 520 U.S. 1185 (1997), *abrogated on other grounds by Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998); *Sec. & Exch. Comm'n v. Vision Commc'ns, Inc.*, 74 F.3d 287, 288 (D.C. Cir. 1996); *U.S. v. Arizona Fuels Corp.*, 739 F.2d 455, 460 (9th Cir. 1984); *Sec. & Exch. Comm'n v. Equity Serv. Corp.*, 632 F.2d 1092, 1095 (3d Cir. 1980). Indeed, Petitioner could not have suffered any prejudice or harm due to a delay in filing the permanent order of appointment, because the order was filed in the Northern District of Texas more than a year and a half ***before*** the Receiver filed the lis pendens and Petitioner entered the deed of trust, and nearly two years ***before*** the California Court imposed a constructive trust on the Marquette Property. Even if the second filing were required, Petitioner has not, and indeed cannot, show a shred of evidence that it was prejudiced as a result.

As such, the Dallas Appeals Court's decision is correct and consistent with the holdings in *Equity*

*Service Corp., Arizona Fuels Corp., Vision Communications,* and *American Capital Investments*. Because this case has been correctly decided and presents no conflict of authority, Long Beach has failed to meet this Court's standards for exercising review. *See* U.S. SUP. CT. R. 10; *Rice*, 349 U.S. at 79.

### C. The Federal Circuits are in Harmony Concerning Section 754.

Long Beach suggests in its Petition that the federal circuits are somehow in conflict in connection with the application of Section 754's filing requirements. The cases, again, are consistent in finding that that a receiver may invoke jurisdiction under Section 754 by either timely filing a complaint and order of appointment, or by belatedly filing them so long as the belated filing occurs before the case is heard, *i.e.*, before any party is prejudiced by the belated filing. *Am. Capital Invs., Inc.*, 98 F.3d at 1136; *Vision Commc'ns, Inc.*, 74 F.3d at 288; *Arizona Fuels Corp.*, 739 F.2d at 460; *Equity Serv. Corp.*, 632 F.2d at 1095. Long Beach attempts to muddle the landscape of the existing case law, but regardless of Long Beach's vague and confusing assertions in its Petition, the federal circuits are in harmony concerning Section 754.

In *Equity Service Corp.*, a federal receiver appointed in an S.E.C. action died before complying with the filing requirements of Section 754 and gaining jurisdiction over certain oil and gas wells

located in a foreign district. *Equity Serv. Corp.*, 632 F.2d at 1093. His replacement did not comply with Section 754 until several months after being appointed. *Id.* More than a year later, the well owners sought to enjoin him from operating the wells by challenging his jurisdiction based on his failure to timely comply with the filing requirements of Section 754. *Id.* at 1094. The Third Circuit held that the receiver had jurisdiction under Section 754 despite the belated filing because the well owners failed to show any harm from the lack of notice in the interim. *Id.* at 1095.

In *Arizona Fuels Corp.*, the Receiver never complied with the filing requirements of Section 754. Nevertheless, the Ninth Circuit held that the Receiver had jurisdiction over the intangible personal property at issue because: (1) the party challenging jurisdiction was not prejudiced by the failure to file because it had received a copy of the complaint and order of appointment and had actual notice of the receivership proceedings, which it participated in; (2) the receivership court had personal jurisdiction over the complaining party separate from Section 754; and (3) the court reasoned that the filing requirement under Section 754 should not apply where the two considerations above are present. *Arizona Fuels Corp.*, 739 F.2d at 460-61. Long Beach relies upon *Arizona Fuels Corp.* to suggest that jurisdiction was improperly asserted in this case. *Arizona Fuels Corp.*, however, simply does not apply to the case at hand. The Ninth Circuit determined that it was not a

requirement that Section 754 be complied with in that case because the assets at issue were personal property "in the form of a monetary credit, held by a party over whom the court already has jurisdiction, who has actual notice of the receivership and has previously appeared in the receivership court" and thus "there is no purpose served in requiring the Receiver to trace the funds to Houston and make a § 754 filing there." *Id.* at 460-61. As a result, there is no conflict between this case and the other cases cited by Petitioner as they relate to the issues presented here. Petitioner implicitly acknowledges as much by merely citing this case in a footnote without any discussion. Petitioner cannot create a circuit split on the issues presented in this case by citing to inapposite cases.

The opinion in *Vision Communications* is in harmony with the decisions in *Equity Service Corp.* and *Arizona Fuels Corp.* In *Vision Communications*, the issue was whether the receiver had acquired in rem jurisdiction over certain transmission rights, including a site lease for a transmission tower, by complying with the filing requirements of Section 754. *See Vision Commc'ns, Inc.*, 74 F.3d at 289; *Sec. & Exch. Comm'n v. Vision Commc'ns, Inc.*, No. 94-0615 (CRR), 1994 WL 855061, at *1 (D.D.C. June 28, 1994) (describing rights at issue as including a site lease for a transmission tower). The Receiver belatedly filed the documents required by Section 754, but not until after the court issued an injunction against the party challenging jurisdiction. *Vision Commc'ns,*

*Inc.*, 74 F.3d at 290. The court acknowledged the *Equity Service Corp.* and *Arizona Fuels Corp.* opinions, and the concept that jurisdiction could be obtained under Section 754 by a belated filing before the case was heard (*i.e.*, where the complaining party was not prejudiced), but held that a belated filing could not confer jurisdiction *retroactively* where an injunction had already been entered. *Id.* at 291. Thus, *Vision Communications* is not in conflict with *Equity Service Corp.* and *Arizona Fuels Corp.*, but is merely distinguishable from them, and recognizes that a belated filing can still invoke jurisdiction under Section 754 where the parties are not prejudiced. *See id.*

Petitioner further mischaracterizes the holding in *American Capital Investments*. In that case, the court did not "specifically h[o]ld that appointment of a permanent receiver *required* the timely filing of a notice pursuant to [Section] 754." *See* Pet. p. 10 (emphasis added). Rather, the court merely held that such a filing was sufficient to invoke jurisdiction under Section 754 where a timely filing was not made within ten days of the district court's issuance of an order of temporary appointment. Thus, *American Capital Investments* stands for the proposition that where a temporary appointment is not timely filed, a permanent appointment provides a new window for timely filing. But it does not follow, as Petitioner suggests, that Section 754 requires the inefficiency of a second filing after a permanent appointment despite the prior timely filing of a temporary

appointment. To the contrary, the court pointed out that even if the filing was late, the complaining party had not shown any resulting prejudice, thereby recognizing (consistently with *Equity Service Corp.*, *Arizona Fuels Corp.*, and *Vision Communications*) that a belated filing still invokes jurisdiction under Section 754 in the absence of prejudice.

Ultimately, the cases cited by Petitioner are in harmony rather than conflict, and stand for the proposition that a belated filing still invokes jurisdiction under Section 754 where the complaining party's rights are not prejudiced. Because there is no "real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals" on this issue, this case fails to meet the standards for exercising review. *Rice*, 349 U.S. at 79; *see also* U.S. SUP. CT. R. 10.

## II. Petitioner's Local Action Doctrine Argument Rests on the Tenuous Constitutional Premise that Congress is Without Power to Effect the Courts' In Rem Jurisdiction under Section 754. Regardless, the Local Action Doctrine is Irrelevant in the Context of the Receivership Jurisdiction Granted under Sections 754 and 1692.

Petitioner's second argument regarding the local action doctrine also fails to meet the standards for review because (1) it rests on a faulty constitutional premise, and (2) the local action doctrine is irrelevant

in the context of receivership jurisdiction under Sections 754 and 1692.

### A. Petitioner's Local Action Doctrine Argument is Based on a Faulty Constitutional Premise, Making Review Improper.

As this Court has recognized, arguments based on tenuous constitutional premises are unworthy of review. *See Brennan v. U.S. Postal Serv.*, 439 U.S. 1345, 1346 (1978) (recognizing that arguments based on tenuous constitutional premises are unlikely to be granted review). Petitioner's local action doctrine argument fails to meet the standards for review because it is based on the faulty premise that Congress lacks the power to set the courts' jurisdiction.

In the first part of its Petition, Petitioner correctly acknowledges that Sections 754 and 1692 authorize federal district courts to exercise intra-district in rem jurisdiction over property located elsewhere in the context of receivership proceedings. As the courts have recognized, "'Together, [Sections 754 and 1692] give a receivership court both in rem and in personam jurisdiction in all districts where property of the receivership estate may be located.'" *Warfield v. Arpe*, CIVA 3:05CV1457 R, 2007 WL 549467, at *11 (N.D. Tex. Feb. 22, 2007) (*quoting Quilling v. Stark*, 3:05-CV-1976-L, 2006 WL 1683442, at *3 (N.D. Tex. June 19, 2006) (*citing Vision Commc'ns, Inc.*, 74 F.3d at 290; *Haile*, 657 F.2d at 823).

But then Petitioner conveniently ignores its own admission and the law in its second argument, contending instead that the local action doctrine alone governs jurisdiction in cases such as this one. Petitioner cannot change Congress's jurisdictional mandate under Sections 754 and 1692 by ignoring it, and this Court should not entertain such a constitutionally specious argument by granting review.

As the Court has repeatedly recognized, only Congress has the power to determine the jurisdiction of federal courts, and as such, state jurisdictional matters at common-law, including the "local action doctrine," are simply irrelevant in the federal receivership context. *Bowles v. Russell*, 551 U.S. 205, 212-13 (2007) (stating that "Within constitutional bounds, Congress decides what cases the federal courts have jurisdiction to consider. Because Congress decides whether federal courts can hear cases at all, it can also determine when, and under what conditions, federal courts can hear them."); *Kontrick v. Ryan*, 540 U.S. 443, 452 (2004) (stating that "Only Congress may determine a lower federal court's subject-matter jurisdiction."). Indeed, it is difficult to imagine a more constitutionally tenuous premise than the one underlying Petitioner's local action doctrine argument: that Congress lacks the power to set the courts' jurisdiction. Because Petitioner's second argument is based on such a tenuous premise, it wholly fails to meet the standard for review. *See Brennan*, 439 U.S. at 1346. Moreover, this argument fails to meet the standards of review under Supreme

Court Rule 10 because Petitioner is merely contending that the local action doctrine has been improperly applied. *See* U.S. SUP. CT. R. 10.

### B. Regardless, the Local Action Doctrine is Irrelevant in the Context of the Receivership Jurisdiction Granted under Sections 754 and 1692.

Petitioner's local action doctrine argument fails to merit review because the local action doctrine is irrelevant in the context of the receivership jurisdiction granted under Sections 754 and 1692. Long Beach openly admits the application of Sections 754 and 1692 to provide a receiver and receivership court with jurisdiction over property located in other districts, including orders affecting such property. As discussed above, the Receiver complied with the necessary statutory requirements. Thus, the local action doctrine is totally inapplicable.

The territorial jurisdiction of the receivership court extends to any district where property of the receivership estate may be located, even if the property is located in different states across the nation. *See Haile*, 657 F.2d at 822, 824; *Cook*, 2001 WL 803791, at *2; *Select Creations, Inc.*, 852 F. Supp. at 780-81. The result is that Sections 754 and 1692 make all actions in the receivership court "local," since the geographic jurisdiction of the court is extended to anywhere receivership property is located. The broad jurisdictional reach of receivership courts

comports with the broad jurisdiction of the receiver itself over receivership property. *Citronelle-Mobile Gathering, Inc.*, 934 F.2d at 1186-87 (holding receiver had power to assert authority over property in foreign country under order allowing such action as to both personal and real property).

Like the bankruptcy court, the receivership court's exercise of in rem jurisdiction creates a fiction that estate property is legally located in the district of the court. *See In re Simon*, 153 F.3d 991, 996 (9th Cir. 1998) (recognizing that the bankruptcy court's exercise of in rem jurisdiction over the debtor's property essentially creates a fiction that the property—regardless of actual location—is *legally* located within the jurisdictional boundaries of the district in which the court sits); *Haile*, 657 F.2d at 823; *Warfield*, 2007 WL 549467, at *11 (recognizing that Sections 754 and 1692 provide for in rem jurisdiction in all districts where receivership property is located). And like the bankruptcy court, the receivership court's power even extends to property located in other countries. *French*, 440 F.3d at 151; *Gucci*, 309 B.R. at 681; *Citronelle-Mobile Gathering, Inc.*, 934 F.2d at 1186-87 (holding receiver had power to assert authority over property in foreign country under order allowing such action as to both personal and real property). Without the far-reaching jurisdictional grants provided by Congress, the bankruptcy and receivership processes would be utterly unworkable. Petitioner invites the Court to limit the jurisdictional reach of the receivership court to the district in which it sits,

which would wreak havoc on that system and require federal receivers to hopscotch across the country, creating utter chaos. The Court should reject that invitation.

The jurisdiction granted under Sections 754 and 1692 is well-recognized by the courts, and renders the local action doctrine inapplicable in this context. Ultimately, Petitioner's complaint is that Sections 754 and 1692 have been misapplied, which is an insufficient basis for review under Supreme Court Rule 10. U.S. SUP. CT. R. 10. Indeed, review of this case is even less appropriate given that the only real issue involved is a narrow priority of claims dispute between the parties under Texas law.

## III. Petitioner's Implied Preemption Argument also Fails to Meet Review Standards Because it Neither Presents a State/Federal Conflict nor an Issue of First Impression. Any Conflict with the Local Action Doctrine Imagined by Long Beach is Based in Sections 754 and 1692, Congressional Mandates that Trump the Local Action Doctrine, a Concept of Common Law.

Petitioner's implied preemption argument also fails to meet any standard for this Court's review. Federal courts have recognized, consistently with this Court's jurisprudence, that the jurisdictional reach of Sections 754 and 1692 confer jurisdiction on the receivership court "irrespective of ***any other factor***

***which would normally determine jurisdiction.***" *See Haile*, 657 F.2d at 822.

This case law is well-established, and Petitioner does not even attempt to distinguish it. Petitioner acknowledges the applicability of these statutes, but attempts to raise the notion of "preemption" by citing to case law concerning federal preemption of state law. Preemption, however, is not at issue. Petitioner challenges a federal court's exercise of jurisdiction over the Marquette Property, but Congress legislated the jurisdictional boundaries of federal receivership courts under Sections 754 and 1692, extending jurisdiction over persons and property to other jurisdictions and extending the geographic boundaries of the receivership court to where receivership property is located.

Sections 754 and 1692 make the federal receivership system workable. To limit the jurisdictional reach of the receivership court to the district in which it sits, as Petitioner proposes, would destroy that system and the purpose of the statutes. Only Congress has the power to determine the jurisdiction of federal courts, and as such, state jurisdictional laws, including the "local action doctrine," have no relevance in the receivership context presented here. *See Bowles*, 551 U.S. at 212-13; *Kontrick*, 540 U.S. at 452. The concept of implied preemption simply has nothing to do with the effect of Sections 754 and 1692 on the local action doctrine, which is merely a common-law concept of in rem jurisdiction subject to alteration by Congressional mandate. Indeed, any conflict with the local action doctrine is based in Sections 754 and

1692, which trump the local action doctrine regardless, and not in the Dallas Appeals Court's decision.

Because the case law is in harmony and the jurisdictional reach of Sections 754 and 1692 has long been recognized, Petitioner's implied preemption argument presents neither a state/federal conflict nor an issue of first impression requiring review under Supreme Court Rule 10. U.S. SUP. CT. R. 10; *Rice*, 349 U.S. at 79.

## CONCLUSION

For the foregoing reasons, Long Beach's Petition for a Writ of Certiorari should be denied, and the Receiver should be granted such and further relief, at law or in equity, to which he may be justly entitled.

Respectfully submitted,

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October 11, 2000

***By Federal Express***

Clerk, United States District Court
Northern District of Texas, Dallas Division
1100 Commerce
Room 14A20
Dallas, TX 75242

Re: Securities and Exchange Commission v. TLC Investments and Trade Co., et al.
USDC Calif. Central District Case No. SACV 00-960-DOC (EEx)
*Miscellaneous Case Under 28 U.S.C § 754*

To whom it may concern:

This office represents Robb Evans, Receiver, in the above-captioned matter. Enclosed please find certified copies of the following documents:

1. Complaint For Violations of the Federal Securities Laws;

2. Temporary Restraining Order and Orders (1) Freezing Assets; (2) Appointing a Temporary Receiver; (3) for Repatriation; (4) Prohibiting the Destruction of Documents; (5) Granting Expedited Discovery; (6) for Accountings; and Order to Show Cause Re

Preliminary Injunction and Appointment of a Permanent Receiver

In accordance with 28 U.S.C. § 754, these documents are being filed in all districts in which property subject to this proceeding may be located. There is no case or proceeding pending in your district for which a filing fee has previously been paid. A check for $20.00 for a miscellaneous filing fee is enclosed.

Please conform the enclosed face sheets and return them to me at your earliest convenience. A self-addressed, stamped envelope is provided. Please contact me at (310) 551-3100 x236 if you have any questions in this regard. Thank you for your assistance.

Very truly yours,

/s/ Judi S. Ehrlich
Judi S. Ehrlich

Encs.

[SEAL]

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

| | |
|---|---|
| SECURITIES AND EXCHANGE COMMISSION,<br>Plaintiff,<br>vs.<br>TLC INVESTMENTS & TRADE CO., TLC AMERICA, INC. dba BREA DEVELOPMENT COMPANY, TLC BROKERAGE, INC., dba TLC MARKETING, TLC DEVELOPMENT, INC., TLC REAL PROPERTIES, RLLP-1, CLOUD & ASSOCIATES CONSULTING, INC., ERNEST F. COSSEY, GARY W. WILLIAMS AND THOMAS G. CLOUD,<br>Defendants. | Case No. SACV 00-960 DOC (EEx)<br>TEMPORARY RESTRAINING ORDER AND ORDERS: (1) FREEZING ASSETS; (2) APPOINTING A TEMPORARY RECEIVER; (3) FOR REPATRIATION; (4) PROHIBITING THE DESTRUCTION OF DOCUMENTS; (5) GRANTING EXPEDITED DISCOVERY; (6) FOR ACCOUNTINGS; AND ORDER TO SHOW CAUSE RE PRELIMINARY INJUNCTION AND APPOINTMENT OF A PERMANENT RECEIVER |

This matter came to be heard upon Plaintiff Securities and Exchange Commission's ("Commission")

Ex Parte Application for a Temporary Restraining Order and Orders: Freezing Assets, Appointing a Temporary Receiver, Repatriating Assets, Prohibiting Destruction of Documents, Granting Expedited Discovery, for Accountings and to Show Cause Re Preliminary Injunction, and Appointment of a Permanent Receiver (the "Application").

* * *

IT IS FURTHER ORDERED that Robb Evans be appointed as temporary receiver of TLC, TLC America, TLC Brokerage, TLC Development, TLC Real Properties, and their subsidiaries and affiliates, with full powers of an equity receiver, including, but not limited to, full power over all funds, assets, collateral, premises (whether owned, leased, occupied, or otherwise controlled), choses in action, books, records, papers and other property belonging to or in the possession of or control of TLC, TLC America, TLC Brokerage, TLC Development, TLC Real Properties, and any of their subsidiaries and affiliates, including any partnerships and joint ventures for which TLC, TLC America, TLC Brokerage, TLC Development, or TLC Real Properties is the Managing General Partner, and that such receiver is immediately authorized, empowered and directed:

A. to have access to and to collect and take custody, control, possession, and charge of all funds, assets, collateral, premises (whether owned, leased, occupied, or otherwise controlled), choses in action, books, records, papers and other property of TLC, TLC

America, TLC Brokerage, TLC Development, TLC Real Properties, and their subsidiaries and affiliates, with full power to sue, foreclose, marshal, collect, receive, and take into possession all such property;

B. to have control of, and to be added as the sole authorized signatory for, all accounts of TLC, TLC America, TLC Brokerage, TLC Development, TLC Real Properties, and their subsidiaries and affiliates, including all accounts over which TLC, TLC America, TLC Brokerage, TLC Development, TLC Real Properties and any of their employees or agents, have signatory authority, at any bank, title company, escrow agent, financial institution or brokerage firm which has possession, custody or control of any assets or funds of TLC, TLC America, TLC Brokerage, TLC Development, TLC Real Properties, or which maintains accounts over which TLC, TLC America, TLC Brokerage, TLC Development, TLC Real Properties and/or any of their employees or agents have signatory authority;

C. to conduct such investigation and discovery as may be necessary to locate and account for all of the assets of TLC, TLC America, TLC Brokerage, TLC Development, TLC Real Properties and their affiliates and to engage and employ attorneys, accountants and other persons to assist in such investigation and discovery;

D. to take such action as is necessary and appropriate to preserve and take control of and to prevent the dissipation, concealment,

or disposition of any assets of TLC, TLC America, TLC Brokerage, TLC Development, TLC Real Properties and their affiliates;

E. to make an accounting, as soon as practicable, to this Court and the Commission of the assets and financial condition of TLC, TLC America, TLC Brokerage, TLC Development, TLC Real Properties and the client assets under their management, and to file the accounting with the Court and deliver copies thereof to all parties;

F. to make such payments and disbursements from the funds and assets taken into custody, control, and possession or thereafter received by him or her, and to incur, or authorize the making of such agreements as may be necessary and advisable in discharging his or her duties as temporary receiver;

G. to employ attorneys and others to investigate and, where appropriate, to institute, pursue, and prosecute all claims and causes of action of whatever kind and nature which may now or hereafter exist as a result of the activities of present or past employees or agents of TLC, TLC America, TLC Brokerage, TLC Development, and TLC Real Properties; and

H. to have access to and monitor all mail of TLC, TLC America, TLC Brokerage, TLC Development, and TLC Real Properties in order to review such mail which he or she deems relates to the business of TLC, TLC America, TLC Brokerage, TLC Development, and TLC Real Properties and the discharging of his or her duties as temporary receiver.

VII.

IT IS FURTHER ORDERED that Defendants TLC, TLC America, TLC Brokerage, TLC Development, TLC Real Properties, Cossey, Williams and their officers, agents, servants, employees and attorneys, and any other persons who are in custody, possession or control of any

* * *

to entertain any suitable application or motion for additional relief within the jurisdiction of this Court.

IT IS SO ORDERED.

DATED: October 4, 2000

TIME: 7 o'clock p.m.

/s/ David O. Carter
UNITED STATES DISTRICT JUDGE

Presented by:

/s/ Marianne Wisner
Marianne Wisner
Attorney for Plaintiff
Securities and Exchange Commission

(Filed October 5, 2000 – CA)

(Filed Oct. 13, 2000 – TX)

**Dressler Rein Evans & Sestanovich LLP**
**Sixteenth Floor**
**1925 Century Park East**
**Los Angeles, CA 90067**
**Tel (310) 551-3100**
**Fax (310) 551-0238** Received January 2, 2001

December 20, 2000

Clerk, United States District Court
Northern District of Texas, Dallas Division
1100 Commerce
Room 14A20
Dallas, TX 75242

Re: Securities and Exchange Commission v. TLC Investments and Trade Co., et al., USDC Case No. SACV 00-960-DOC (EEx)
*Miscellaneous Case Under 28 U.S.C. § 754*
*Your Reference Number: #300MC-100*

To whom it may concern:

This office represents Robb Evans, Receiver, in the above-captioned matter. On October 11, 2000, we sent you certified copies of (1) Complaint For Violations of the Federal Securities Laws, and (2) Temporary Restraining Order and Orders (1) Freezing Assets; (2) Appointing a Temporary Receiver; (3) for Repatriation; (4) Prohibiting the Destruction of Documents; (5) Granting Expedited Discovery; (6) for Accountings; and Order to Show Cause Re Preliminary Injunction and Appointment of a Permanent Receiver. In accordance with 28 U.S.C. § 754, those documents were filed in all districts in which property subject to this proceeding may be located.

A Miscellaneous Filing Fee of $20.00 was provided. Your office thereafter confirmed that the documents were filed on 10/13/00 and assigned Misc. File Number #300MC-100.

On November 1, 2000, the Court issued an "Order of Preliminary Injunction and Orders (1) Freezing Assets; (2) Appointing a Receiver; (3) Prohibiting the Destruction of Documents; (4) for Accountings; (5) for Repatriation, and (6) for Expedited Discovery". A certified copy of the November 1, 2000 Order (which appoints Robb Evans as *Permanent* Receiver) is now enclosed for inclusion with Misc. File Number #300MC-100.

Please conform the enclosed face sheet and return it to me at your earliest convenience. A self-addressed, stamped envelope is provided. Please contact me at (310) 551-3100 x236 if you have any questions in this regard. Thank you for your assistance.

Very truly yours,

/s/ Judi S. Ehrlich
Judi S. Ehrlich

Enclosures

---

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

| | |
|---|---|
| SECURITIES AND EXCHANGE COMMISSION,<br>Plaintiff,<br>vs.<br>TLC INVESTMENTS & TRADE CO., et al.<br>Defendants. | Case No. SACV 00-960-DOC (EEx)<br>[~~PROPOSED~~] ORDER OF PRELIMINARY INJUNCTION AND ORDERS: (1) FREEZING ASSETS; (2) APPOINTING A RECEIVER; (3) PROHIBITING THE DESTRUCTION OF DOCUMENTS; (4) FOR ACCOUNTINGS; (5) FOR REPATRIATION OF ASSETS; AND (6) FOR EXPEDITED DISCOVERY<br>(Filed Nov. 1, 2000 – CA) |

This matter came to be heard on October 30, 2000, upon the Court's Order To Show Cause Re Preliminary Injunction And Appointment Of A Permanent Receiver ("OSC"), issued on October 4, 2000 and filed on October 5, 2000. The OSC is included in the Court's Temporary Restraining Order and Orders: Freezing Assets, Appointing a Temporary Receiver, Repatriating Assets, Prohibiting Destruction of Documents, Granting Expedited Discovery, for Accountings

and to Show Cause Re Preliminary Injunction, and Appointment of a Permanent Receiver ("TRO").

* * *

[Names And Bank Number Omitted In Printing]

VII.

IT IS FURTHER ORDERED that Robb Evans be appointed as receiver of TLC, TLC America, TLC Brokerage, TLC Development, TLC Real Properties, and their subsidiaries and affiliates, with full powers of an equity receiver, including, but not limited to, full power over all funds, assets, collateral, premises (whether owned, leased, occupied, or otherwise controlled), choses in action, books, records, papers and other property belonging to or in the possession of or control of TLC, TLC America, TLC Brokerage, TLC Development, TLC Real Properties, and any of their subsidiaries and affiliates, including any partnerships and joint ventures for which TLC, TLC America, TLC Brokerage, TLC Development, or TLC Real Properties is the Managing General Partner, and that such receiver is immediately authorized, empowered and directed:

A. to have access to and to collect and take custody, control, possession, and charge of all funds, assets, collateral, premises (whether owned, leased, occupied, or otherwise controlled), choses in action, books, records, papers and other property of TLC, TLC America, TLC Brokerage, TLC Development,

TLC Real Properties, and their subsidiaries and affiliates, with full power to sue, foreclose, marshal, sell, liquidate, collect, receive, and take into possession all such property;

B. to have control of, and to be added as the sole authorized signatory for TLC, TLC America, TLC Brokerage, TLC Development, TLC Real Properties, and their subsidiaries and affiliates, including all accounts over which TLC, TLC America, TLC Brokerage, TLC Development, TLC Real Properties and any of their officers, employees or agents, have signatory authority, at any bank, title company, escrow agent, financial institution or brokerage firm which has possession, custody or control of any assets or funds of TLC, TLC America, TLC Brokerage, TLC Development, TLC Real Properties, or which maintains accounts over which TLC, TLC America, TLC Brokerage, TLC Development, TLC Real Properties and/or any of their officers, employees or agents have signatory authority;

C. to conduct such investigation and discovery as may be necessary to locate and account for all of the assets of TLC, TLC America, TLC Brokerage, TLC Development, TLC Real Properties and their affiliates and to engage and employ attorneys, accountants and other persons to assist in such investigation and discovery;

D. to take such action as is necessary and appropriate to preserve and take control of

and to prevent the dissipation, concealment, or disposition of any assets of TLC, TLC America, TLC Brokerage, TLC Development, TLC Real Properties and their affiliates;

E. to make an accounting, as soon as practicable, to this Court and the Commission of the assets and financial condition of TLC, TLC America, TLC Brokerage, TLC Development, TLC Real Properties and the client assets under their management, and to file the accounting with the Court and deliver copies thereof to all parties;

F. to make such payments and disbursements from the funds and assets taken into custody, control, and possession or thereafter received by him or her, and to incur, or authorize the making of such agreements as may be necessary and advisable in discharging his or her duties as receiver;

G. to employ attorneys and others to investigate, advise and, where appropriate, to institute, pursue, and prosecute all claims and causes of action of whatever kind and nature which may now or hereafter exist as a result of the activities of present or past employees or agents of TLC, TLC America, TLC Brokerage, TLC Development, and TLC Real Properties; and

H. to have access to and monitor all mail of TLC, TLC America, TLC Brokerage, TLC Development, and TLC Real Properties in order to review such mail which he deems relates to the business of TLC, TLC America,

TLC Brokerage, TLC Development, and TLC Real Properties and the discharging of his duties as receiver;

I. to exercise all of the powers of TLC, TLC America, TLC Brokerage, TLC Development, and TLC Real Properties and their officers, directors, employees, representatives, or persons who exercise similar powers and perform similar duties;

VIII.

IT IS FURTHER ORDERED that Defendants TLC, TLC America, TLC Brokerage, TLC Development, TLC Real Properties, Cossey, Williams and their officers, agents, servants, employees and attorneys, and any other persons who are in custody, possession or control of any assets, collateral, books, records, papers or other property of TLC,

* * *

requests for living expenses if and when their financial situations change. Further, Defendants Cossey and Williams may also renew their requests for attorneys' fees after they submit full accountings to the Court, the Receiver, and the Commission.

XXI.

IT IS FURTHER ORDERED that this Court shall retain jurisdiction over this action for the purpose of implementing and carrying out the terms of all orders and decrees which may be entered herein

and to entertain any suitable application or motion for additional relief within the jurisdiction of this Court.

IT IS SO ORDERED.

DATED: ~~October~~ __, November 1, 2000

/s/ David O. Carter
HONORABLE DAVID O. CARTER
UNITED STATES DISTRICT JUDGE

Presented by:

/s/ Marianne Wisner
MARIANNE WISNER
Attorney for Plaintiff
Securities and Exchange Commission

# NOTICE OF LIS PENDENS

(Filed Jul. 23, 2002)

| | | | | |
|---|---|---|---|---|
| STATE OF TEXAS | § | | | 1919765 |
| | § | 07/24/02 | 3359469 | $11.00 |
| COUNTY OF DALLAS | § | Miscellaneous Real Estate | | |

NOTICE IS HEREBY GIVEN that Case No., 01-6466, styled *ROBB EVANS, as Receiver for TLC America, Inc., Plaintiff v. James F. Garro, an individual; David Price, an individual; Paul Chovanec, an individual; Allison-McCloskey Escrow Co., a California corporation; Navajo Capital, Inc., a Wyoming corporation; Siena Financial Ltd., a British Virgin Islands corporation; Camelot International, LLC, a Wyoming limited liability company; Merlin Financial, LLC, a Wyoming limited liability company; The Lancelot foundation, a Wyoming nonprofit company; Appaloosa International, Inc., a Wyoming corporation; Citation Financial Management, Inc., a Wisconsin corporation; Durham Capital Group, Inc., a Nevada corporation; & Fortress Financial Ltd., a British Virgin Islands corporation, Defendants;* was commenced in the United States District Court for the Central District of California on July 27, 2001 and is now pending in such court.

The action seeks to establish an interest or a right in real property situated in Dallas County, Texas, and described as follows:

7843 Marquette Street, Dallas, Texas 75225-4400
Caruth Village Phase 2
Blk R/5450 LT 10
VOL 99209/6210 DD 102399 CO-DALLAS

The action is for fraud and deceit; aiding and abetting; conversion; money had and received; negligence; breach of fiduciary duty; and constructive fraud.

SIGNED this 17 day of July, 2002.

/s/ Charles M. Silverman
Charles M. Silverman

---

STATE OF TEXAS §
§
COUNTY OF HARRIS §

Subscribed and sworn to before me this 17 day of July, 2002 by Charles M. Silverman.

WITNESS my hand and official seal.

/s/ Susan D. Stroud
Notary Public in and For the State of Texas

My commission expires: 5-20-03

FF $31.00 GF#686146. T ATC/mo

| | | |
|---|---|---|
| After Recording | | 1932820 |
| Please Return To: | 08/02/02 | 3377095 |
| LONG BEACH MORTGAGE COMPANY | Deed of Trust | $31.00 |
| P.O. BOX 201085 | | |
| STOCKTON, CA 95202 | | |

[Space Above This Line For Recording Data]

Loan No: 4585154 Data ID: 278
Borrower: DAVID H. PRICE

THIS SECURITY INSTRUMENT SECURES AN EXTENSION OF CREDIT AS DEFINED BY SECTION 50(a)(6), ARTICLE XVI OF THE TEXAS CONSTITUTION.

TEXAS HOME EQUITY SECURITY INSTRUMENT
(Cash Out – First Lien)

This Security Instrument is not intended to finance Borrower's acquisition of the Property.

THIS SECURITY INSTRUMENT is made on July 24, 2002. The grantor is DAVID H. PRICE AND WIFE, CAROL M. PRICE

("Borrower").

The trustee is TROY GOTSCHALL, whose address is 1100 TOWN AND COUNTRY ROAD, #1600, ORANGE, CA 92868

("Trustee").

The beneficiary is LONG BEACH MORTGAGE COMPANY, A CORPORATION,

which is organized and existing under the laws of the State of DELAWARE, and whose address is 1100 TOWN & COUNTRY ROAD, #900, ORANGE, CA 92868

("Lender").

Borrower owes Lender the principal sum of FOUR HUNDRED THOUSAND and NO/100 – Dollars (U.S. $ 400,000.00). This debt is an extension of credit as defined by Section 50(a)(6), Article XVI of the Texas Constitution (referred to herein as the "Extension of Credit") and is evidenced by Borrower's note dated the same date as this Security Instrument (the "Note"), which provides for monthly payments, with the full debt, if not paid earlier, due and payable on August 1, 2032. This Security Instrument secures to Lender: (a) the repayment of the debt evidenced by the Note, with interest, and all renewals, extensions and modifications of the Note; (b) the payment of all other sums, with interest, advanced under Paragraph 7 to protect the security of this Security Instrument; and (c) the performance of Borrower's covenants and agreements under this Security Instrument and the Note. For this purpose, Borrower irrevocably grants and conveys to Trustee, in trust, with power of sale, the following described property located in DALLAS County, Texas:

BEING LOT 10, BLOCK R/5450 OF CARUTH VILLAGE ADDITION, PHASE II, AN ADDITION TO THE CITY OF DALLAS, DALLAS COUNTY, TEXAS, ACCORDING TO THE PLAT THEREOF RECORDED

IN VOLUME 98008, PAGE 1458, MAP RECORDS, DALLAS COUNTY, TEXAS.

which has the address of 7843 MARQUETTE STREET,
[Street]
DALLAS, TEXAS 75225 ("Property Address").
[City] [Zip Code]

TEXAS HOME EQUITY SECURITY INSTRUMENT
(Cash Out – First Lien) – Fannie Mae/Freddie Mac
UNIFORM INSTRUMENT

* * *

---

Supreme Court, U.S.
FILED
MAY 27 2010
OFFICE OF THE CLERK

No. 09-1258

IN THE
# Supreme Court of the United States

LONG BEACH MORTGAGE COMPANY,

*Petitioner,*

*v.*

ROBB EVANS
AS RECEIVER FOR TLC AMERICA, INC.,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF TEXAS, FIFTH DISTRICT

## REPLY BRIEF

PERRY J. COCKERELL
*Counsel of Record*
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*Attorneys for Petitioner*

230126

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

## CORPORATE DISCLOSURE STATEMENT

Petitioner's corporate disclosure statement was set forth at page *ii* of its Petition for a Writ of Certiorari, and there are no amendments to that statement.

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## INTRODUCTION

This case is about whether a federal receiver may file suit in the receivership proceeding where he was appointed to establish a real property interest in non-receivership property located outside the State where he was appointed, assuming proper compliance 28 U.S.C. § 754 or whether the receiver must file the suit in the State where the property is located under this Court's Local Action Doctrine adopted in *Ellenwood v. Marietta Chair Co.*, 158 U.S. 105, 107 S.Ct. 771, 39 L. Ed. 913 (1895).

The judgment below from the California federal court where Respondent established his interest in Texas real property was void because neither Respondent nor the federal court that adjudicated his constructive trust claim interest had subject matter jurisdiction over the real property in question. Respondent failed to timely re-file his permanent appointment documents in Texas where the property was located under 28 U.S.C. § 754. But even if Respondent had timely filed his reappointment papers and secured jurisdiction properly, his constructive trust claim as filed (App A – Excerpt of Respondent's California complaint) would have failed in Texas because Texas law expressly forbids the use of a lis pendens in a constructive trust cause of action where diverted funds are the basis of the claim. *Flores v. Haberman*, 915 S.W. 2d 477, 478 (Tex. 1995) The *Flores* decision holds that the constructive trust claim based on converted funds used to acquire real property is deemed a collateral

interest into the real property and not a valid title dispute between Petitioner and Respondent. *Flores v. Haberman,* 915 S.W. 2d 477, 478 (Tex. 1995)

Texas has a formal procedure to determine title to real property called "Trespass to Try Title." TEX. PROP. CODE § 22.001 (Vernon 2004) The litigation process has its own special rules of civil procedure. (App B - TEX. R. CIV. P. 783- 809) Respondent alleged no such complaint to establish his interest in the Marquette Property in his federal complaint. (App A). The absence of the Texas trespass to try title cause of action being pled in the California litigation means that Respondent's constructive trust claim was never litigated in the California court. (App. A)

To the extent that the California judgment determined that Respondent had a valid title interest in the Marquette Property for the Respondent, the judgment should be declared void and not entitled to Full, Faith and Credit. U.S. CONST. art. IV, § 1. The manner in which it was ultimately obtained and enforced offended traditional notions of fair play and substantial justice. This Court should reverse the Fifth Court of Appeals at Dallas, Texas and declare that the California judgment is void insofar as adjudicating Respondent's constructive trust claim having priority over Petitioner's lien claim in the Marquette Property. This Court should hold that Petitioner's claim to the Marquette Property has priority to that of Respondent under the *Flores* decision. Further, the Court should enforce its Local Action Doctrine in *Ellenwood* in cases involving title disputes where the district courts otherwise have in rem jurisdiction over the real property under 28 U.S.C. § 754 or decide

whether Congress intended to federalize all such litigation in the receivership proceedings outside the state where the property was located.

## RESPONDENT'S JURISDICTION OVER THE MARQUETTE PROPERTY EXPIRED AND WAS NOT TIMELY RENEWED WHEN HE WAS PERMANENTLY APPOINTED UNDER 28 U.S.C. § 754

While it has been held that 28 U.S.C. § 754 permits a receiver to obtain *in rem* jurisdiction over receivership property located in other federal districts, *Stenger v. World Harvest Church, Inc.*, 2003 U.S. Dist. LEXIS 15108 (N.D. Ill. 2003), Congress requires that to do so a receiver must timely file their appointment documents in the federal district where the property is located within ten days after the entry of their appointment. *United States SBA v. Herbst*, 2009 U.S. Dist. LEXIS 40993 (N.J. 2009) (ten-day requirement satisfied). If they fail to timely file such documents in the federal district where property is located the federal courts addressing the question have held that a new or renewed appointment restarts the 10-day clock under Section 754. *Securities & Exchange Comm'n v Khanna*, 2010 U.S. Dist. LEXIS 42775 (S.D. CA 2010) (order of re-appointment restarts 10-day deadline under 28 U.S.C. § 754).

Respondent glosses over the requirement of compliance with the key dates as required by Section 754. It is undisputed that under the California Local Rules, Respondents temporary appointment expired on October 31, 2000. Respondent's argument that his

temporary appointment on October 4, 2000, never expired is also contrary to California Local Rule 66-2 in effect in 2000 that states:

> A temporary receiver shall not be appointed for a period longer than the next Motion Day following the expiration of twenty (20) days after the date of appointment.

LOCAL RULE CIV P. 66-2, CALIF. CENTR. DIST.

Upon Respondent's reappointment on November 1, 2000. Respondent failed to timely file his reappointment papers within ten-days after that date in the Northern District of Texas where the Marquette Property was located. Thus, Respondent's claim that the initial temporary appointment as receiver never lapsed is contrary to the law of the circuit in which he was appointed, *Id.*, and of other circuits addressing the question that the 10-day period starts from the permanent appointment, not the temporary appointment. *Sec. Exch. Comm'n v. American Capital Investments, Inc.*, 98 F. 3d 1133 (9th Cir. 1996); *Sec. Exch. Comm'n v. Vision Communications, Inc.*, 74 F. 3d 287, 291 (D.C. 1996). Congress did not legislate that Section 754 be a procedural rule that can be waived such as a deadline to file a non-dischargeability complaint as in *Kontrick v. Ryan*, 540 U.S. 443, 452 (2004) cited by Respondent.

The issue was whether the failure to comply with Section 754, a federal statute, resulted in the Respondent and the federal court losing subject matter jurisdiction in the absence of a reappointment and a

timely filing of his reappointment papers and complaint in the Northern District of Texas.

Section 754 is simple and clear. If the complaint and order of appointment is not filed in the district court where the property is located then the failure to file such copies "shall divest the receiver of jurisdiction and control over all such property in that district." Petitioner's reading is not "ultra-technical." (See Respondent's Brief in Opposition, p. 21). In construing a phrase in order to resolve differences in the Circuits, the primary weight is upon the need for judicial administration to remain as simple as possible. *Hertz Corp. v. Friend*, 130 S. Ct. 1181, 175 L.Ed. 2d 1029 (2010). Respondent was divested of jurisdiction over the Marquette property when he filed his reappointment papers untimely in the Northern District of Texas when they were filed on January 2, 2001, more than 10-days after his permanent appointment. Respondent admits to a late filing on page 8 of his Brief in Opposition.

## ASSUMING RESPONDENT ACQUIRED JURISDICTION OVER THE MARQUETTE PROPERTY, TEXAS LAW PROHIBITS A LIS PENDENS IN A CONSTRUCTIVE TRUST SUIT BASED ON CONVERTED FUNDS

Respondent learned of the Marquette Property in July 2002 and:

> ". . . [i]mmediately upon discovering the Marquette Property, the Receiver filed a Notice of Lis Pendens providing Notice of his

> interest and rights in the Marquette Property. The Receiver filed the Notice of Lis Pendens on July 23, 2002. . ."

(Respondent's Brief in Opposition, p. 9 – 10).

Respondent also admits that in the California litigation that:

> The Receiver asserted claims of fraud, conversion, negligence and breach of fiduciary duty. The Receiver also sought the imposition of a constructive trust on property purchased with funds stolen from TLC America.

(Respondent's Brief in Opposition, p. 8); (App. A)

In Texas, a lis pendens cannot be filed to enforce a constructive trust claim based on converted funds. *Flores v. Haberman*, 915 S.W. 2d 477, 478 (Tex. 1995) In *Flores* the Court held that the creation of a constructive trust into real property acquired by converted funds is a collateral interest in real property and not a title dispute for which a lis pendens is proper. A lis pendens is improper in that case because it serves to trap the real property during the litigation in order to satisfy a judgment and is a remedy for a constructive trust claim. The *Flores* rule prohibiting the use of a lis pendens in cases involving the conversion of money was criticized in a 2008 law review article by Professor Florrie Young Roberts at Seton Hall:

> Nevertheless, some courts have expunged lis pendens in actions for a constructive trust where tracing of funds is involved or where

> plaintiffs have also sought damages. These courts have concluded that the constructive trust claims are filed "as a collateral means to collect money damages" or primarily for the purpose of securing money damages, and therefore, are not real property claims required by the lis pendens statutes.
>
> These courts ignore the clear language of the statutes authorizing the recordation of a lis pendens in actions involving real property. Additionally, the statutory safeguards that already exist are sufficient to prevent abuse of the lis pendens process.

*See* Roberts, *The Propriety of a Lis Pendens in Constructive Trust Cases*, 38 Seton Hall L. Rev. 213, 251 (2008.) Despite the criticism, *Flores* is settled law in Texas.

The *Long Beach* decision below is now contrary to the *Flores* decision. That the Texas Supreme Court decided to leave the decision of the Dallas Court of Appeals alone shows that great deference is being given to the federal court judgment in California that established jurisdiction over the Marquette Property: "[M]oreover, the California federal court continued its jurisdiction over the case to resolution." *Long Beach Mortg. Co.*, 284 S.W.3d at 411.

Federal receivers may now file a Texas constructive trust claim in the federal court where they are appointed and may enforce those claims against Texas property based on the *Long Beach* case. This is a remarkable federalized exception to the *Flores* decision. The Court should not allow the California final judgment to be

entitled to Full, Faith and Credit because of the confusion this case will cause to Texas law and the law of other states. Respondent still has a constructive claim in the Marquette Property; but under *Flores,* Section 12.007 of the Texas Property Code, is not a mechanism to trap the real property during the course of the administration of the receivership or to permit the receiver to have priority over others with an interest in the property.

28 U.S.C. § 754 could have clearly provided that title disputes be tried in the receivership proceedings rather than in the states where the property is located. Therefore it is not proper to read into the statute that the Local Action Doctrine was abandoned by reason of it. Respondent's fears that if federal receivers are forced to litigate title disputes in the district where the real property is located would result in receivers having to "hopscotch across the country creating utter chaos" is misplaced. (Respondent's Brief In Opposition, p.34) Neither party can cite to another case quite like this where the federal receiver filed a lis pendens in the county of the state where the real property was located presumably to give "constructive notice" to the world of the litigation and then proceeded to litigate the federal receiver's "constructive trust" claim against only one property owner (that was legitimately before the federal court) and completely omitting the other property owners and/or lien claimants.

The Local Action Doctrine is not only sound but is the most rational doctrine for establishing the location for real property disputes to be tried. Had Respondent simply followed the rule this would have resulted in one lawsuit against all property owners and Petitioner, rather than four successive lawsuits, causing perhaps a

staggering sum of litigation costs to the TLC America receivership proceeding in order to achieve the ultimately irrational judgment that was eventually obtained below.

## THE CALIFORNIA FEDERAL COURT JUDGMENT OFFENDS TRADITIONAL NOTIONS OF FAIR PLAY AND SUBSTANTIAL JUSTICE

Respondent's judgment in California should not have been entitled to Full, Faith and Credit. U.S. CONST. art. IV, § 1. The underlying premise on which it was obtained and applied to Petitioner violates traditional notions of fair play and substantial justice. This Court's holdings in *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L. Ed 95 (1945) and *Shaffer v. Heitner*, 433 U.S. 186, 97 S. Ct. 2569, 53 L. Ed 2d 683 (1977) require fair notice of litigation through minimum contacts in the foreign state in *in rem* and *quasi in rem* litigation. Fair warning applies to defendants who purposefully avail themselves in the forum states. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 105 S.Ct. 2174, 85 L.Ed 2d 528 (1985). Petitioner was never a party to the California litigation.

Under Texas law, the court may cancel a lis pendens upon motion by a "person interested in the result of or in property affected by a proceeding in which a lis pendens has been recorded" if the court can determine that the party seeking affirmative relief can be adequately protected. TEX. PROP. CODE § 12.008 (Vernon 2004) Petitioner's ability to cancel the lis pendens could have been accomplished only by appearing in the California federal court (where it was not made a party to the lawsuit). The California judgment offends *Int'l Shoe* and *Shaffer* because Petitioner never

availed itself in California and should not have been left with the option to having to intervene in the California litigation in order to test the validity of Respondent's lis pendens under Section 12.008 of the Texas Property Code based on the *Flores* decision.

Applying the constructive trust claim as established by the lis pendens filing was unfair to Petitioner. Petitioner's loan was made and closed in Texas. Under Texas law, Respondent's lis pendens was void because it violated the *Flores* decision. Texas law provides that the recording of instruments which are not permitted by law is not notice. *Burnham v. Chandler*, 15 Tex. 441, 443 (1855) ("[A]s the registration law does not require or authorize the instrument of assignment referred to in this case to be recorded, the record would not be notice of the existence of such instrument."); *Countrywide Home Loans v. Howard*, 240 S.W.3d 1 (Tex. App. – Austin 2007, pet. denied) Petitioner's notice of the California litigation was based on a void lis pendens that violated Section 12.007 of the Texas Property Code, the *Flores* decision, and was filed in the real property records on the same that its loan closed.

Respondent alleged that subject matter jurisdiction in the suit was based on federal question jurisdiction under 28 U.S.C. § 1331. (App. A – Respondent's Amended Complaint) Respondent claims that his constructive trust claim is based on "fraud, conversion, negligence and breach of fiduciary duty." (Respondent's Brief in Opposition, p. 8) Federal question jurisdiction rests on claims that arise under the Constitution, laws or treatises of the United States. Respondent's lis pendens filing in Dallas County, Texas references that

"[t]he action seeks to establish an interest or a right in real property situation in Dallas County, Texas . . ." (Respondent's App. 16) Respondent does not state whether any of its common law claims were based on Texas or California law.

Respondent's other ground for jurisdiction was on the basis of 28 U.S.C. § 754. (App. A) As argued above, Respondent's jurisdiction over the Marquette Property expired.

It is undisputed that Respondent did not know of the Marquette Property at the time he filed his January 2002 amended complaint and that he did not file a supplemental complaint identifying the Marquette Property or his claim to it. The amended complaint did not describe the Marquette Property nor the basis for the conversion of funds into the real property and whether that basis was on Texas law or California law. (App. A.) No doubt that the federal court would have granted leave to amend to allege a new claim against the Marquette Property. F. R. CIV. P. 15(a) (leave of court is freely given).

This Court recognizes that the state where the land is located is the "sole mistress" of its rules of real property. *Williams v. North Carolina*, 317 U.S. 287; 63 S. Ct. 207; 87 L. Ed. 279 (1942); *Yarborough v. Yarborough*, 290 U.S. 202, 54 S. Ct. 181, 78 L. Ed 269 (1933); *Hood v. McGehee*, 237 U.S. 611; 35 S. Ct. 718 (1915). *See also, Sleeping Child LLC v. Lewis and Clark Capital LLC et al*, 2008 Mont. Dist. LEXIS 492 (2009) (state district court found that Montana had specific jurisdiction over the real property dispute and that

leave of the federal court to file the action was not required when the federal receiver filed a document that affected the title in that state.)

## CONCLUSION

This Court should grant petition for writ of certiorari and hold that the judgment in California to the extent that it adjudicated title should be declared void, that the Texas courts erred in extending Full Faith and Credit to it. The Court should reaffirm its Local Action Doctrine with regard to proceedings filed by federal receivers under 28 U.S.C. § 754. For the foregoing reasons, a writ of certiorari should be granted.

Respectfully submitted,

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# APPENDIX A — EXCERPT FROM FIRST AMENDED COMPLAINT FOR DAMAGES AND INJUNCTIVE RELIEF AND DEMAND FOR TRIAL BY JURY DATED JANUARY 17, 2002

## UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

CASE NO. SACV01-819 DOC (ANX)

ROBB EVANS, as Receiver for TLC America, Inc.,

Plaintiff,

vs.

JAMES F. GARRO, an individual; DAVID PRICE, an individual; PAUL CHOVANEC, an individual; TERRY E. PROVENCE, an individual; ALLISON-McCLOSKEY ESCROW CO., a California corporation; NAVAJO CAPITAL, INC., a Wyoming corporation; SIENNA FINANCIAL LTD., a British Virgin Islands corporation; CAMELOT INTERNATIONAL, LLC, a Wyoming limited liability company; MERLIN FINANCIAL, LLC, a Wyoming limited liability company; CORFU INTERNATIONAL, LLC, a Wyoming corporation; THE LANCELOT FOUNDATION, a Wyoming nonprofit company; APPALOOSA INTERNATIONAL, INC., a Wyoming corporation; CITATION FINANCIAL MANAGEMENT, INC., a Wisconsin corporation; CERTEX INVESTMENTS, INC., a Wisconsin corporation; DURHAM CAPITAL GROUP, INC., a Nevada corporation; and FORTRESS FINANCIAL LTD., a British Virgin Islands corporation,

Defendants.

*Appendix A*

**FIRST AMENDED COMPLAINT FOR DAMAGES AND INJUNCTIVE RELIEF FOR:**

**1. FRAUD AND DECEIT;**

**2. AIDING AND ABETTING;**

**3. CONVERSION;**

**4. MONEY HAD AND RECEIVED;**

**5. NEGLIGENCE;**

**6. BREACH OF FIDUCIARY DUTY; AND**

**7. CONSTRUCTIVE FRAUD**

**AND DEMAND FOR TRIAL BY JURY**

Plaintiff ROBB EVANS, as Receiver for TLC America, Inc. ("Receiver" or "TLC"), complains and alleges against Defendants, and each of them, as follows:

**JURISDICTION AND VENUE**

1. Subject matter jurisdiction is based on, among other provisions, 28 U.S.C. Section 1331. By Order of the Court dated October 5, 1999, Robb Evans was appointed Temporary Receiver over the assets of TLC Investments and Trade Co., TLC America, Inc., TLC Brokerage, Inc., TLC Development, Inc., TLC Real Properties, RLLP-1 and their subsidiaries and affiliates.

Mr. Evans was made permanent Receiver on November 1, 2000. The November 1, 2000, Order, paragraph VII., gives Mr. Evans full powers of an equity receiver, including "full power over all funds, assets, collateral, . . . and other property belonging to or in the possession of or control of TLC, TLC America, TLC Brokerage, TLC Development, TLC Real Properties, and any of their subsidiaries and affiliates [hereinafter the Receivership entities]." Pursuant to Paragraph VII, Mr. Evans was specifically directed to ". . . take custody, control, possession, and charge of all funds, assets, collateral, . . . of [the Receivership entities], with full power to sue, foreclose, marshal, sell, liquidate, collect, receive, and take into possession all such property." Mr. Evans was further directed to "take such action as is necessary and appropriate to preserve and take control of and to prevent the dissipation, concealment or disposition of any assets of [the Receivership entities];" (par. VII. D.) and, "where appropriate, to institute, pursue, and prosecute all claims and causes of action of whatever kind and nature which may now or hereafter exist as a result of the activities of present or past employees or agents of [the Receivership entities]." (par VII. G.).

2. Subject matter jurisdiction is further based on 28 U.S.C. section 754, which also vests the Court with ancillary jurisdiction over matters within the Receiver's powers. This Complaint alleges that the Defendants are holding, or facilitated in the diversion of, TLC's assets. The Receiver has traced TLC's funds to the Defendants and to bank accounts and investment accounts

maintained by them. The Receiver has further traced TLC's funds to the purchase of real property in La Jolla, California, Santa Fe, New Mexico, and Encinitas, California, by Defendant James F. Garro and/or entities he controls. The Santa Fe property is more fully described as:

> Tract A2 as shown and delineated on plat entitled "Survey Plat Prepared for Christopher Rote Showing a Division of Tract A recorded in Book 294, Page 013, City and County of Santa Fe, N.M. Projected Section 8, T17N, R10E, NMPM", prepared by Gary E. Dawson, NMPLS No. 7014, dated March 27, 1995 and filed as Document No. 929,643 in Plat Book 323, Page 44, in the records of Santa Fe County, New Mexico.

The Encinitas property is more fully described as:

> Lot 101 of CITY OF ENCINITAS TRACT NO. 4579-2 in the City of Encinitas, County of San Diego, State of California, according to Map thereof No. 11922 filed in the Office of the County Recorder of San Diego, October 23, 1987.

3. Accordingly, the Court has jurisdiction over this matter because it seeks the recovery of property of the Receivership Entities. The district court which appoints a receiver in a primary action for which subject matter jurisdicion exists has ancillary subject matter

jurisdiction for all additional suits brought by a receiver pursuant to the order of appointment regardless of whether a separate jurisdictional basis exists for instituting action in the United States District Court.

4. As further set forth herein, the Court has personal jurisdiction because each Defendant is either domiciled in this State or has sufficient minimum contacts with this State.

5. Venue is proper in this District pursuant to 28 U.S.C. Section 1391(b) in that the wrongful diversion of assets from TLC originated in this District. Moreover, a substantial part of the events or omissions on which TLC's claims are based occurred in this District. For example, Defendant James Garro sent correspondence to Mr. Cossey in Orange County and convinced him to "invest" TLC's funds in the scheme alleged herein. Moreover, in reliance on Garro's false representations, TLC wired $20,000,000 from its bank account in Orange County — approximately $10,000,000 of which has not been returned.

* * * *

## APPENDIX B — RELEVANT TEXAS RULES OF CIVIL PROCEDURE SECTION 8. TRESPASS TO TRY TITLE

### Rule 783. Requisites of Petition

The petition shall state:

(a) The real names of the plaintiff and defendant and their residences, if known.

(b) A description of the premises by metes and bounds, or with sufficient certainty to identify the same, so that from such description possession thereof may be delivered, and state the county or counties in which the same are situated.

(c) The interest which the plaintiff claims in the premises, whether it be a fee simple or other estate; and, if he claims an undivided interest, the petition shall state the same and the amount thereof.

(d) That the plaintiff was in possession of the premises or entitled to such possession.

(e) That the defendant afterward unlawfully entered upon and dispossessed him of such premises, stating the date, and withholds from him the possession thereof.

(f) If rents and profits or damages are claimed, such facts as show the plaintiff to be entitled thereto and the amount thereof.

(g) It shall conclude with a prayer for the relief sought.

**Rule 784. The Possessor Shall Be Defendant**

The defendant in the action shall be the person in possession if the premises are occupied, or some person claiming title thereto in case they are unoccupied.

**Rule 785. May Join As Defendants, When**

The plaintiff may join as a defendant with the person in possession, any other person who, as landlord, remainderman, reversioner or otherwise, may claim title to the premises, or any part thereof, adversely to the plaintiff.

**Rule 786. Warrantor, Etc., May Be Made a Party**

When a party is sued for lands, the real owner or warrantor may make himself, or may be made, a party defendant in the suit, and shall be entitled to make such defense as if he had been the original defendant in the action.

*Appendix B*

**Rule 787. Landlord May Become Defendant**

When such action shall be commenced against a tenant in possession, the landlord may enter himself as the defendant, or he may be made a party on motion of such tenant; and he shall be entitled to make the same defense as if the suit had been originally commenced against him.

**Rule 788. May File Plea of "Not Guilty" Only**

The defendant in such action may file only the plea of "not guilty," which shall state in substance that he is not guilty of the injury complained of in the petition filed by the plaintiff against him, except that if he claims an allowance for improvements, he shall state the facts entitling him to the same.

**Rule 789. Proof Under Such Plea**

Under such plea of "not guilty" the defendant may give in evidence any lawful defense to the action except the defense of limitations, which shall be specially pleaded.

*Appendix B*

**Rule 790. Answer Taken As Admitting Possession**

Such plea or any other answer to the merits shall be an admission by the defendant, for the purpose of that action, that he was in possession of the premises sued for, or that he claimed title thereto at the time of commencing the action, unless he states distinctly in his answer the extent of his possession or claim, in which case it shall be an admission to such extent only.

**Rule 791. May Demand Abstract of Title**

After answer filed, either party may, by notice in writing, duly served on the opposite party or his attorney of record, not less than ten days before the trial of the cause, demand an abstract in writing of the claim or title to the premises in question upon which he relies.

**Rule 792. Time to File Abstract**

Such abstract of title shall be filed with the papers of the cause that within thirty days after the service of the notice, or within such further time that the court on good cause shown may grant; and in default thereof, the court may, after notice and hearing prior to the beginning of trial, order that no written instruments which are evidence of the claim or title of such opposite party be given on trial.

*Appendix B*

**Rule 793. Abstract Shall State, What**

The abstract mentioned in the two preceding rules shall state:

(a) The nature of each document or written instrument intended to be used as evidence and its date; or

(b) If a contract or conveyance, its date, the parties thereto and the date of the proof of acknowledgment, and before what officer the same was made; and

(c) Where recorded, stating the book and page of the record.

(d) If not recorded in the county when the trial is had, copies of such instrument, with the names of the subscribing witnesses, shall be included. If such unrecorded instrument be lost or destroyed it shall be sufficient to state the nature of such instrument and its loss or destruction.

**Rule 794. Amended Abstract**

The court may allow either party to file an amended abstract of title, under the same rules, which authorize the amendment of pleadings so far as they are applicable; but in all cases the documentary evidence of title shall at the trial be confined to the matters contained in the abstract of title.

*Appendix B*

**Rule 795. Rules in Other Cases Observed**

The trial shall be conducted according to the rules of pleading, practice and evidence in other cases in the district court and conformable to the principles of trial by ejectment, except as otherwise provided by these rules.

**Rule 796. Surveyor Appointed, Etc**

The judge of the court may, either in term time or in vacation, at his own discretion, or on motion of either party to the action appoint a surveyor, who shall survey the premises in controversy pursuant to the order of the court, and report his action under oath to such court. If said report be not rejected for good cause shown, the same shall be admitted as evidence on the trial.

**Rule 797. Survey Unnecessary, When**

Where there is no dispute as to the lines or boundaries of the land in controversy, or where the defendant admits that he is in possession of the lands or tenements included in the plaintiff's claim, or title, an order of survey shall be unnecessary.

*Appendix B*

**Rule 798. Common Source of Title**

It shall not be necessary for the plaintiff to deraign title beyond a common source. Proof of a common source may be made by the plaintiff by certified copies of the deeds showing a chain of title to the defendant emanating from and under such common source. Before any such certified copies shall be read in evidence, they shall be filed with the papers of the suit three days before the trial, and the adverse party served with notice of such filing as in other cases. Such certified copies shall not be evidence of title in the defendant unless offered in evidence by him. The plaintiff may make any legal objection to such certified copies, or the originals thereof, when introduced by the defendant.

**Rule 799. Judgment by Default**

If the defendant, who has been personally served with citation according to law or these rules fails to appear and answer by himself or attorney within the time prescribed by law or these rules for other actions in the district court, then judgment by default may be entered against him and in favor of the plaintiff for the title to the premises, or the possession thereof, or for both, according to the petition, and for all costs, without any proof of title by the plaintiff.

*Appendix B*

**Rule 800. Proof Ex Parte**

If the defendant has been cited only by publication, and fails to appear and answer by himself, or by attorney of his own selection, or if any defendant, having answered, fails to appear by himself or attorney when the case is called for trial on its merits, the plaintiff shall make such proof as will entitle him prima facie to recover, whereupon the proper judgment shall be entered.

**Rule 801. When Defendant Claims Part Only**

Where the defendant claims part of the premises only, the answer shall be equivalent to a disclaimer of the balance.

**Rule 802. When Plaintiff Proves Part**

Where the defendant claims the whole premises, and the plaintiff shows himself entitled to recover part, the plaintiff shall recover such part and costs.

**Rule 803. May Recover a Part**

When there are two or more plaintiffs or defendants any one or more of the plaintiffs may recover against one or more of the defendants the premises, or any part thereof, or any interest therein, or damages, according to the rights of the parties.

*Appendix B*

**Rule 804. The Judgment**

Upon the finding of the jury, or of the court where the case is tried by the court, in favor of the plaintiff for the whole or any part of the premises in controversy, the judgment shall be that the plaintiff recover of the defendant the title or possession, or both, as the case may be, of such premises, describing them, and where he recovers the possession, that he have his writ of possession.

**Rule 805. Damages**

Where it is alleged and proved that one of the parties is in possession of the premises, the court or jury, if they find for the adverse party, shall assess the damages for the use and occupation of the premises. If special injury to the property be alleged and proved, the damages for such injury shall also be assessed, and the proper judgment shall be entered therefor, on which execution may issue.

**Rule 806. Claim for Improvements**

When the defendant or person in possession has claimed an allowance for improvements in accordance with Sections 22.021—22.024, Texas Property Code, the claim for use and occupation and damages mentioned in the preceding rule shall be considered and acted on in connection with such claim by the defendant or person in possession.

*Appendix B*

**Rule 807. Judgment When Claim for Improvements Is Made**

When a claim for improvements is successfully made under Sections 22.021—22.024, Texas Property Code, the judgment shall recite the estimated value of the premises without the improvements, and shall also include the conditions, stipulations and directions contained in Sections 22.021—22.024, Texas Property Code so far as applicable to the case before the court.

**Rule 808. These Rules Shall Not Govern, When**

Nothing in Sections 22.001—22.045, Texas Property Code, shall be so construed as to alter, impair or take away the rights of parties, as arising under the laws in force before the introduction of the common law, but the same shall be decided by the principles of the law under which the same accrued, or by which the same were regulated or in any manner affected.

**Rule 809. These Rules Shall Not Govern, When**

Nothing in these rules relating to trespass to try title shall be so construed as to alter, impair or take away the rights of parties, as arising under the laws in force before the introduction of the common law, but the same shall be decided by the principles of the law under which the same accrued, or by which the same were regulated or in any manner affected.